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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

BRENT E. KOSTER,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to
the Kalamazoo County Circuit Court

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

I. Whether Petitioner Was Denied His Right to Be Personally *Present* at the State Sentencing Phase When All Sentencing Considerations Were Argued Behind Closed Doors in the Absence of the Petitioner, Resulting in Extreme Prejudice to Him?

II. Whether Petitioner Had a Fundamental Fairness Right to Be Personally *Heard*, in the Form of Allocution, at the Sentencing Phase of a Non-Capital State Criminal Case? If So, Was this Right Rendered Meaningless by the Court?

III. Whether Petitioner Was Denied His Right to the Effective Assistance of Counsel at the State Sentence Hearing Where the Record Reflects That Counsel Said Absolutely *Nothing* in Mitigation of a Potential Life Sentence?

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Brent E. Koster respectfully petitions for a writ of certiorari to review the judgment of the Kalamazoo County Circuit Court in this case.

Opinions Below

The Michigan Supreme Court issued an order denying reconsideration (App. 54), __ Mich. __, 641 N.W.2d 856 (2002), of its order denying an application for leave to appeal (App. 53), 465 Mich. 916, 636 N.W.2d 527 (2001). The Michigan Court of Appeals issued an unpublished order denying a delayed application for leave to appeal (App. 52). The Kalamazoo County Circuit Court issued an unpublished opinion and order denying Petitioner's Motion for Relief from Judgment. (App. 11).

Basis for Jurisdiction

The Michigan Supreme Court entered its order denying reconsideration on March 4, 2002. App. 54. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Constitutional Provisions Involved

The Sixth and Fourteenth Amendments to the United States Constitution. App. 96.

Statement of the Case

Petitioner, Brent E. Koster, at the age of fifteen years old, committed the crimes of murder and rape with a co-defendant who was thirteen years his senior. These crimes occurred in 1972. Petitioner entered into a plea agreement whereby he would be allowed to plead guilty to a reduced charge of murder in exchange for his testimony against his co-defendant. App. 71-74.

The details of Petitioner's crimes are set forth in the Presentence Investigation Report, July 7, 1975. App 80.

In July 1975, Petitioner, after pleading guilty, appeared for his sentence hearing. Defense counsel conferred with Petitioner and stated that it was his "belief" that Petitioner would receive a life sentence. Petitioner, now eighteen years old and upset by counsel's statement, asked that he be permitted to speak with the judge outside the presence of the public. Defense counsel conveyed Petitioner's request in open court and the judge granted it. App. 91-92.

At this off-the-record, in-chambers conference, Petitioner specifically conveyed to the judge that he had spoken with defense counsel and reiterated counsel's belief that the judge would be imposing a sentence of life imprisonment. The judge did not dispute counsel's statement. Petitioner tried to impress upon the judge that a life sentence was not appropriate because he had done everything that the police and the prosecuting attorney asked of him. The judge responded by stating that Petitioner was responsible for a heinous crime. Petitioner replied that the plea agreement was not much of a deal. The in-chambers conference concluded shortly afterwards. App. 105-106.

At the formal sentence hearing, the court asked whether there was "anything else I need to know" before pronouncing the sentence. Both defense counsel and Petitioner said no. The assistant prosecuting attorney also did not say anything. The court then pronounced a sentence of life imprisonment, App. 92, and entered a Record of Sentence. App. 55.

Petitioner did not appeal his conviction or sentence until twenty years after his arrest. On September 11, 1992, Petitioner file a belated request for appointment of appellate counsel. The trial court granted the request and appointed the State Appellate Defenders Office, Detroit, Michigan. In support of his request for appellate counsel, Petitioner stated that he believed the passage of time had proven the plea

agreement to be illusory in nature because he had not received any serious parole consideration.[1] App. 97-102.

After appointment of appellate counsel, Petitioner's family hired a psychologist to prepare an in-depth psychological evaluation of Petitioner. In August 1998, during the preparation of background information for the evaluation, the psychologist interviewed defense counsel and specifically asked about counsel's failure to say anything during the sentence hearing. In response, defense counsel stated that the trial judge had convened an in-chambers, pre-sentence conference with the pre-sentence investigator, assistant prosecuting attorney, and himself and "that things were done differently then." The psychologist further quoted defense counsel as stating that during this conference the "Judge made it clearly known that he was going to announce a life sentence at the sentence hearing." The psychologist quoted defense counsel as stating that "this is the reason why he did not say anything at the actual time of sentencing." The psychologist then conveyed the existence of this conference to Petitioner. Defense counsel had never apprised Petitioner of this sentencing conference. App. 108-109.

Petitioner then contacted defense counsel and obtained a sworn affidavit setting forth the content of this off-the-record pre-sentence conference. Defense counsel stated that the "standard practice of the circuit court at that time" was for the judge to convene an in-chambers, pre-sentence conference and "the judge would then state the sentence he had determined to impose at the in-court sentencing hearing." Defense counsel further stated that they discussed his client's sentence and the judge made "it clearly known" to those present that his client would be receiving a sentence of life imprisonment. Defense

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[1]The essence of the plea agreement was that Petitioner would spend time in prison and would become eligible for parole after serving 10 years (now 15 years). *See* App. 111 (Mich. Comp. Laws § 791.234(6)(b)). Petitioner is now approaching his 30th calendar year of incarceration.

counsel stated that this is why he did not say anything at the formal, in-court sentence hearing. App. 103-104.

In 2000, after Petitioner's post-conviction hearing, the Kalamazoo County Circuit Court, Kalamazoo, Michigan, issued an unpublished written opinion and order addressing the legal claims raised herein involving Petitioner's right to be present at the in-chambers, pre-sentence conference; right of allocution; and right to effective assistance of counsel. App. 1-10.

Stages of the State Proceedings

Petitioner initially filed a post-conviction motion for relief from judgment with state trial court. Oral arguments were held on December 7, 1999. App. 11-51. The trial judge issued a 10 page written opinion and order on January 19, 2000 denying Petitioner any relief. App. 1-10.

Petitioner then filed a discretionary review appeal in the Michigan Court of Appeals which was denied in an order on June 7, 2001. App. 52. This order was then appealed to the Michigan Supreme Court by discretionary review and denied in an order on November 30, 2001. App. 53. Petitioner sought reconsideration of the November 30, 2001 order which was denied in an order on March 4, 2002. App. 54.

Argument I: The first argument was raised in Petitioner's supporting brief to his Motion for Relief from Judgment as a due process claim citing *People v. Pulley*, 411 Mich. 523, 534, 309 N.W.2d 170 (1981) (quoting *Lewis v. United States*, 146 U.S. 370 (1892) and *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

The court addressed the issue in its entirety, App. 7-8, as follows:

> Nevertheless, in 1975, holding an in-chambers presentence conference outside

> the presence of the defendant was considered a lawful practice, and that so long as the defendant was later given the opportunity to address the court during the formal sentence hearing, his right to allocution was not jeopardized or denied. *People v. Dumas*, 102 Mich. App. 196, 198, 301 N.W.2d 849 (1980). Defendant had the opportunity to address the court during his formal sentence hearing and during his own in-chambers meeting. Defendant's argument is without merit.

Argument II: The second argument was raised in Petitioner's supporting brief to his Motion for Relief from Judgment as a due process claim citing *Green v. United States*, 365 US 301 (1961), *People v. Berry*, 409 Mich. 774, 781, 298 N.W.2d 434 (1980) and *People v. McNeal*, 150 Mich. App. 85, 90, 389 N.W.2d 708 (1985). *See* App. 128-137 and 138-143, respectively.

The trial court addressed the issue in its written opinion and order, App. 7-8, stating that Petitioner's claim "stems from the 1975 practice that the judge and the attorneys hold (sic) an in-chambers conference before sentencing" where counsel argued the case to the judge for allocution at the in-chambers conference. The court summarized by stating that Petitioner "argues that the judge made up his mind in chambers and there was nothing the Defendant could say that would make a difference." The court, App. 7, concluded:

> Defendant cites to *People v. McNeal*, 150 Mich App 85, 90; 389 NW2d 708 (1985) for the premise that where a trial court indicates, *prior to allocution*, that it has already determined the sentence it is going to impose, any subsequent allocution is rendered meaningless and requires a resentencing. Although the Court

> acknowledges this case, it is not helpful with the present situation. Here, the Judge never indicated before the in-chambers conference, in other words, *prior to allocution*, that he determined the sentence. The Defendant's trial attorney had the opportunity for allocution. **In fact, upon Defendant's request, Defendant had an in-chambers conference with the Judge also.** (Emphasis in original.)

Argument III: Petitioner's last argument was raised in his supporting brief to his Motion for Relief from Judgment as a violation of effective assistance of counsel citing *Strickland v. Washington*, 466 U.S. 668 (1984).

The trial court's opinion and order appears to state that counsel's decision not to say anything at the sentence hearing was a tactical and strategic decision. The trial court, App. 9-10, stated:

> Defendant alleges that Mr. Hills was ineffective at sentencing for his failure to order a psychological evaluation and his failure to allocute on record. As stated earlier, a psychological evaluation was not necessary in lieu of the presentence report. Further, Mr. Hills submitted an affidavit stating that he argued before Judge McCauley at the presentence in-chambers conference. He said nothing further at the time of sentencing because the matter had been allocuted and decided at the in-chambers conference and the Defendant himself had a chance for allocution with the Judge in chambers. The decision to allocute is a tactical or strategic one. *People v. Hughes*, 165 Mich. App. 548, 550 (1987). Defendant's claims are without merit.

Arguments

I. Petitioner Had a Fundamental Fairness Right to Be Personally *Present* at the Pre-Sentence, In-Chambers Conference When All Discussions and Arguments Relating to the Length of Sentence Were Made by Counsel for the Parties, and Petitioner Was Severely Prejudiced By His Absence in Violation of the Due Process Clause of the 14th Amendment.

Unbeknownst to Petitioner, the sentencing court convened a pre-sentence, in-chambers conference with the presence of the assistant prosecuting attorney, defense counsel, and the pre-sentence investigator.[2] Petitioner was not present. During this conference, discussions and arguments on the length of the sentence were presented to the judge, who then made "it clearly known" that he would be imposing a sentence of life imprisonment at the formal sentence hearing. App. 103, ¶ 7.

This local sentencing practice and procedure was commonplace in the Kalamazoo County Circuit Court at that time and has been characterized as the "standard practice" by counsel. App. 103, ¶ 3. The assistant prosecuting attorney conceded this practice during the State appeal. App. 110.

Petitioner's exclusion from this pre-sentence conference resulted in extreme prejudice to him. Because Petitioner was not aware of the discussions or arguments made at this off-the-record conference, he could not have fairly addressed the court at the formal sentence hearing. Petitioner's total lack of knowledge of what the judge and counsel for the parties said at this conference prevented him from intelligently offering

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[2]Petitioner did not become aware of this July 21, 1975 conference until August 1998. The existence of this conference was conveyed to the Petitioner by Dr. William D. Brooks, Psychologist, who had discovered it during a background interview with defense counsel. App. 108-109.

any response or rebuttal to any adverse statement or argument. Petitioner could not even agree with or bolster any statements or arguments made by his own attorney. To this day, he does not know what, if any, argument his attorney made on his behalf. Nor could Petitioner address any questions or statements made by the judge. Petitioner was totally unaware of any aggravating or mitigating statements.

This sentencing practice resulted in further prejudice to Petitioner. Just weeks before the sentence proceedings, Petitioner had pled guilty pursuant to a plea agreement that allowed him to plead guilty to a reduced offense of second degree murder in exchange for his testimony against the co-defendant. The Petitioner's decision to enter into the plea agreement was premised on the length of sentence.[3]

At the official sentence hearing, no aggravating circumstances were offered by the assistant prosecuting attorney nor did defense counsel offer any mitigating circumstances. Petitioner also declined to make a statement because he felt that it was an act of futility since his attorney expressed his belief that he would be given a life sentence and the judge in chambers confirmed counsel's statement. As it turned out, Petitioner also had been kept in the dark on virtually all sentencing considerations even though the length of sentence was the main bargaining chip in the plea agreement.

Petitioner submits that his lack of *presence* at this crucial pre-sentence, in-chambers conference resulted in his inability to effectively be *heard* at the informal pre-sentence conference and formal sentence hearing.

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[3]Mich. Comp. Laws § 750.317 (punishable by "imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.").

A. The State Sentencing Phase a is Critical Stage of the Criminal Process.

The sentencing process must satisfy the requirements of the Due Process Clause. Sentencing is a critical stage of the criminal proceeding. *Mempa v. Rhay*, 389 U.S. 128, 134-135 (1967); *Specht v. Patterson*, 386 U.S. 605, 609-610 (1967). The defendant has a legitimate interest in the character of the procedure that leads to the imposition of the sentence. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977).

B. There is a Constitutional Right to Be Present at the Sentencing Phase of the Criminal Process.

An accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. *People v. Pulley*, 411 Mich. 523, 534, 309 N.W.2d 170 (1981) (Defendants have the right to be personally present at every stage of the trial where their substantial rights may be affected by the proceedings and where their presence relates to the fullness of their opportunity to defend against the charge.), citing *Lewis v. United States*, 146 U.S. 370 (1892) and *Snyder v. Massachusetts*, 291 U.S. 97 (1934). *See also Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.") and *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) ("It is now accepted * * * that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, *Snyder v. Massachusetts* * * *.")

> [T]he requirements of criminal justice ... leave no doubt of [the defendant's] right to be present when a final determination of sentence

> is made.... Even if he has spoken earlier, a defendant has no assurance that when the time comes for final sentence the district judge will remember the defendant's words in his absence and give them due weight. Moreover, only at the final sentencing can the defendant respond to a definitive decision of the judge.

United States v. Behrens, 375 U.S. 162, 167-68 (1963) (Harlan, J., concurring in the result). The defendant's presence at sentencing is a deeply rooted procedural protection and no mere formality.

C. Petitioner Was Denied His Right to Be Personally Present at the Critical Pre-Sentence, In-Chambers Conference That Ultimately Resulted in a Fundamentally Unfair Sentence Hearing.

Petitioner stood before the court with a plea agreement in hand that stated that the court would allow him to plead guilty to a reduced charge. He understood that the sentence imposed could be any term of years or life imprisonment and that the sentence would be at the discretion of the court. The terms of the plea agreement, negotiated by retained counsel, did not contain a sentence agreement or recommendation.

The length of sentence was the main bargaining chip in the plea agreement and it was *the* crucial factor at the sentence hearing. Yet on sentencing day Petitioner was left in the dark on all sentencing considerations because these considerations were stated, discussed, and *settled* behind closed doors in the judge's chambers and in Petitioner's absence. Not only was Petitioner denied an invitation, he was not even told that the judge had convened an in-chambers pre-sentence conference.

`At the formal sentence hearing, neither party made a statement on aggravating or mitigating circumstances,

presumably because any statements relating to the issue of sentence had already been expressed in the judge's chambers. If Petitioner had been present during this pre-sentence conference, he would have been privy to the statements and arguments about the length of sentence made by the assistant prosecutor and the pre-sentence investigator. Petitioner also would have heard the mitigating factors expressed by defense counsel. Petitioner could have either made his own responses or explained them to defense counsel who could have articulated them on his behalf to the judge.

Petitioner also would have been able to listen to any comments, statements or questions about the length of sentence posed by the judge and to have responded accordingly. At the time, the state court rule, GCR 1963, 785.8, explicitly allowed Petitioner "a reasonable opportunity to advise the court of any circumstances [the defendant and his lawyer] believe the court should consider in imposing sentence." App. 127. Petitioner was placed in an extremely disadvantageous position which prejudiced his ability to effectively present mitigating circumstances to the court for its consideration because he was not allowed to sit at the conference table in chambers and hear the positions of those present and the judge's questions and responses.

The unique importance of a defendant's presence at sentencing was expressed by this Court in *Green v. United States*, 365 U.S. 301, 304 (1961):

> The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.

Petitioner was simply not ability to respond to the facts or circumstances cited by *those who were present* at the in-chambers conference because of his absence from the in-chambers conference. Petitioner's absence from this conference and the resulting inability to effectively be heard at

his sentence hearing violates the most sacred tenets of the Due Process Clause: the right to be present; the right to be heard; and principles of fundamental fairness attached to each of these fundamental rights at the sentence hearing process.

Petitioner urges this Court to order a new sentence hearing after holding that the "standard practices" of the Kalamazoo County Circuit Court in 1975 were fundamentally unfair in violation of the Due Process Clause, *Synder v. Massachusetts*, 291 U.S. at 107-108, and that Petitioner's "presence would have contribute[d] to the fairness of the [sentencing] procedure." *Kentucky v. Stincer*, 482 U.S. at 745.

II. Petitioner Had a Fundamental Fairness Right to Be Personally *Heard*, in the Form of Allocution, Prior to a Determination or Announcement of Punishment Which was Essential to a Fair Sentence Hearing in Conformity with the Due Process Clause of the 14th Amendment.

In *Green v. United States*, 365 U.S. 301 (1961), this Court discussed the evolution of the common-law right to allocution, from its recognition as early as 1689 in English law to its current inclusion in the Federal Rules of Criminal Procedure, Rule 32. The purpose of the right of allocution is to provide the defendant with an opportunity to plead personally for mitigation or mercy because "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Id.* at 304. This Court said that it is not enough that defense counsel has an opportunity to speak at sentencing; the defendant must be given this right personally. Failure to afford a defendant the opportunity to speak on his own behalf has been construed as a violation of Rule 32, requiring a new sentence hearing.

Notwithstanding Rule 32, this Court limited the right to allocution by holding that a violation of it could not be raised by collateral attack, absent exceptional circumstances. *Hill v. United States*, 368 U.S. 424, 428 (1962). This Court stated that a violation of the right to allocution is not an error which is either jurisdictional or constitutional; it is not a fundamental defect that results in a complete miscarriage of justice, "nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" (citations omitted.) *Id.* at 428.

Since *Hill*, this Court has not determined "whether silencing a defendant who wished to speak" as to his sentence would be a constitutional error. "We have not since had occasion to deal with this or related problems at length." *See*

McGautha v. California, 402 U.S. 183, 218 n.22 (1971). Nor has this Court addressed whether denying a defendant a "meaningful opportunity" to speak at his sentence hearing rises to the level of a constitutional error, an error which this case presents.

Here, like in *Green*, the right to allocation is specifically set forth by court rule, see App. 121 and 127, and strictly construed in common law. *People v. Berry*, 409 Mich. 774, 298 N.W.2d 434 (1980) and *People v. McNeal*, 150 Mich. App. 85, 389 N.W.2d 708 (1985). *See* App. 128 and 138, respectively. Unlike the *Green* case, however, this case presents the additional question of whether the defendant was affirmatively denied a "meaningful opportunity" to speak at his sentence hearing when the judge made "it clearly known" during a pre-sentence conference the defendant was not allowed to attend that the defendant would be sentenced to life imprisonment at the formal in-court sentence hearing.

This case also presents an opportunity for this Court to revisit *Green*. Petitioner urges this Court to reconsider the question of whether a defendant's personal right of allocution is of constitutional magnitude within the meaning of the Due Process Clause in light of its "ancient" origins in common law, *United States v. Behrens*, 375 U.S. 162, 165 (1963) (Black, J.), "elementary right," *id.* at 167 (Harlan, J., concurring), a "traditional right," *Groppi v. Leslie*, 404 U.S. 496, 501 (1972) (Burger, C.J.), of "immemorial origin," *McGautha*, 402 U.S. at 217 (Harlan, J.), and of major significance because "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green*, 365 U.S. at 304 (Frankfurter, J.).

A. Facts.

Unbeknownst to Petitioner, the sentencing court convened a pre-sentence, in-chambers conference with the assistant prosecuting attorney, the pre-sentence investigator,

and defense counsel where all issues relating to the length of sentence were raised, discussed, and argued to the judge. It was at this conference where the judge rendered Petitioner's formal in-court right to allocution "meaningless" when he made "it clearly known" to those present that he would be imposing a term of life imprisonment at the formal in-court sentence hearing. Defendant's in-chambers conference with the judge and his on-the-record opportunity to allocute occurred afterwards. Defense counsel has stated that this practice was consistent with the "standard practice" of the Kalamazoo County Circuit Court at that time. App. 103-104. The assistant prosecuting attorney also admitted this practice during the State appeal. App. 110.

B. The Petitioner Possessed a Fundamental Right to Be Heard at his Sentence Hearing.

As Justice O'Connor stated, "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.' " *Ford v. Wainwright*, 477 U.S. 399, 430 (1986) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948)"); *Simmons v. South Carolina*, 512 U.S. 154, 174 (1994) (Ginsburg, J., concurring) ("This case is most readily resolved under a core requirement of due process, the right to be heard").

It is undisputed that the right to be heard is a bedrock fundamental principle of procedural due process.

C. The Sentencing Court Rendered Petitioner's Right to Be Heard through Allocution Meaningless in Violation of the Due Process Clause.

While a fundamental requirement of due process is the opportunity to be heard, "[i]t is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

> A *pro forma* opportunity will not do. (footnote omitted.) Due process demands an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see *In re Oliver*, 333 U.S. 257, 275 (1948) (defendant must be afforded "a reasonable opportunity to meet [the charges against him] by way of defense or explanation"); *Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."). Absent a full, fair, potentially effective opportunity to defend against the State's charges, the right to a hearing would be "but a barren one." *Ibid.*; see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) ("process which is a mere gesture is not due process").

Gray v. Netherland, 518 U.S. 152, 182 (1996) (Ginsburg, J., dissenting) (accused convicted of capital murder and sentenced to death held not entitled to retroactive federal

habeas corpus relief on basis of new "notice-of-evidence" capital sentencing rule).

In this case, counsel spoke to Petitioner at the sentence hearing and expressed his belief that the judge would impose a life sentence. Petitioner, who became unsettled by this statement, asked counsel to convey to the judge his wish to speak to the judge outside the presence of the public. App. 105, ¶ 3. Petitioner's request was raised by counsel at the onset the sentence hearing. The court granted Petitioner's request and the judge retired to chambers with Petitioner, counsel, and the assistant prosecuting attorney. App. 91.

Petitioner asked the judge about counsel's belief that he would be sentenced to life imprisonment and the judge did not deny counsel's statement. Petitioner indicated that he had done everything asked of him by the police and the prosecuting attorney in accordance with the plea bargain. The judge responded by raising the seriousness of the offense. Petitioner stated that the plea agreement was not much of a deal. The in-chambers conference then ended. App. 105-106.

When the court reconvened the sentence hearing, it indicated the existence of this in-chambers conference and who was present. The sentencing court then stated: "Is there anything else I need to know before I pronounce sentence?" Both counsel and Petitioner declined comment. The court then imposed a life sentence with the recommendation that Petitioner never be considered for or released on parole. App. 92.

Not until August 1998 did Petitioner learn that *another* in-chambers conference had been convened that day. *See* n.2, *supra*. Petitioner then personally contacted defense counsel and obtained a sworn affidavit detailing this conference. App. 103-104. It was at this time that Petitioner verified the existence of this other in-chambers conference.

Petitioner raised his allocution issue in the state court in a belated appeal by claiming that the sentencing judge had already determined the sentence without the benefit of

Petitioner's allocution, violating his right to procedural due process. *Green v United States, supra,* and *People v. McNeal,* 150 Mich. App. 85, 389 N.W.2d 708 (1985).

The state circuit court, however, misconstrued the legal issue. It addressed defense counsel's right to allocution but failed to address how the court's standard sentencing practice affected *Petitioner's* right to allocution. App. 7-8. Petitioner maintains that he was given a "meaningless opportunity" to be heard on the issue of sentence.

The judge, during an in-chambers, pre-sentence conference, announced the sentence that he would be imposing at the formal in-court sentence hearing. In essence, the *real* sentence hearing was conducted in chambers without the knowledge or presence of Petitioner. The sentence was determined by the judge before the formal sentence hearing was convened in open court.

The judge's thinly veiled attempt to extend an opportunity to be heard to Petitioner before sentencing was an empty gesture, totally devoid of purpose, intent or meaning because the judge had already determined the sentence in chambers. Nothing Petitioner could offer, cite, or otherwise say would have affected the sentencing intentions of the judge, especially as Petitioner did not know what had been discussed. As a result, Petitioner's right to be *heard* was reduced to a "meaningless opportunity" for allocution because he was not allowed to allocute *prior* to the determination of the sentence.

Petitioner respectfully urges this Court to hold that the "standard practice" of sentencing within the Kalamazoo County Circuit Court at that time was inconsistent with the rudimentary demands of fair procedure because it rendered Petitioner's right to be *heard* a meaningless opportunity for allocution and urges this Court to order a new sentence hearing consistent with the rudimentary demands of fair procedure.

III. Petitioner Was Denied His Sixth Amendment Right to the Effective Assistance of Counsel at His State Non-Capital Sentence Hearing When There Was a *Total* On-The-Record Failure to Advocate.

A. Facts.

Pursuant to a plea agreement, Petitioner was allowed to plead guilty to a reduced offense of second degree murder in exchange for his testimony against the co-defendant. *See* n.1. This agreement did not set forth a sentence agreement, nor does the record reflect a recommendation made by the prosecutor. Therefore, the sentencing court was free to exercise its broad discretion in fashioning punishment.

At the sentence hearing, however, Mr. Hills, defense counsel, neither offered any mitigating circumstances nor requested any form of leniency. Mr. Hills only asked that the time credited towards the sentence (1,051 days) be extended by one day because his client had calculated it as being 1,052 days. App. 91. Mr. Hills also conveyed his client's request that he be allowed to speak with the judge outside the presence of the public. App. 91.

Mr. Hills stated in his sworn affidavit that "Judge McCauley ma[d]e it clearly known to the parties that he was going to sentence my client to life imprisonment." App. 104, ¶ 7. The judge's in-chambers announcement is the reason he "did not say anything at the actual sentencing proceedings when asked by Judge McCauley if there was anything further" to say before pronouncing the sentence. App. 104, ¶ 9.

The record reflects that counsel did not say a word in mitigation of a potential life sentence. Mr. Hills states in his sworn affidavit that "[t]he standard practice" of the court "at that time was for the sentencing judge to hold an in-chambers pre-sentence conference and the judge would then state the sentence he had determined to impose at the in-court sentencing hearing." App. 103, ¶ 3. He also stated that during

"this in-chambers conference, arguments were made by the Prosecuting Attorney, the Pre-Sentence Investigator, and myself to Judge McCauley regarding the sentence of Mr. Koster." App. 103, ¶ 6.

Just prior to the sentence hearing, Mr. Hills conferred with his client indicating his "belief" that the judge would be imposing life imprisonment. Mr. Hills did not inform his client that he had attended a pre-sentence conference where he learned that the judge would be imposing a life sentence. App. 106, ¶ 12. The sentencing court imposed a life sentence with the recommendation that Petitioner never be considered for or released on parole. App. 92.

B. Defense Counsel's Basic Duties.

This Court, in *Strickland v. Washington*, 466 U.S. 668, 688 (1984), articulated several basic duties of defense counsel that apply here: (1) the overarching duty to advocate his client's cause; (2) the particular duty to consult with his client on important decisions and to keep his client informed of important developments in the course of the prosecution; and (3) the duty to bring to bear such skill and knowledge as will render the sentence hearing a reliable adversarial testing process. Here, in the ordinary, non-capital sentencing hearing, counsel's duties were no less of a requirement than in a capital sentence hearing. In a capital case, the worst outcome is a sentence of death, whereas in this non-capital case, the worst outcome is the sentence of life imprisonment. Petitioner received the worst possible sentence.

Mr. Hills did not explore, let alone offer or argue, any mitigating circumstances. The record is barren of any comments about the length of sentence. App. 91-95. Mr. Hills' complete failure to advocate Petitioner's case in court; his failure to consult with Petitioner on the important decision not to offer any mitigating circumstances; his failure to inform Petitioner of the existence of the pre-sentence, in-chambers

conference; and his failure to bring to bear his skill and knowledge on the issue of sentencing illustrates a *total* abandonment of his basic duties at this critical stage, the sentence hearing.

C. The *Strickland* Standard.

1. *Performance.*

Mr. Hills did not say anything at the sentence hearing, and this was a conscious and admitted decision. The question is whether counsel's decision shows that his performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 688.

Was Mr. Hills' decision not to perform a reasonable one in light of the sentencing court's announcement that his client would receive the maximum sentence, life imprisonment? Emphatically not. In fact, Mr. Hills' duty to perform became even more compelling once he learned the judge's position as well as the position of the prosecution and the pre-sentence investigator. The sentence hearing - as opposed to an off-the-record informal conference - was the time and place to lay it all on the line and ask the court to reconsider its decision by balancing the aggravating and mitigating circumstances in arriving at an appropriate sentence. After learning of the court's sentencing intentions, Mr. Hills did not even ask for a postponement so that he could acquire additional information about the extenuating and mitigating circumstances so that he could regroup and truly "strategize" to avert the impending life sentence. Mr. Hills knew that his eighteen year old client was about to receive a life sentence, but he said nothing. Retained counsel gave up at the very time when his assistance to his client was the most vitally necessary in light of the circumstances. *See Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) (counsel's silence at

sentence hearing constituted constructive denial of effective assistance of counsel).

A reasonably competent attorney would agree that a formal sentence hearing minimally involves assisting a client by "marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence." *Mempa v. Rhay*, 389 U.S. 128, 135 (1967).

a. Deference.

The decision not to perform is a decision that this Court should never sanction because it directly affects Petitioner's constitutional right to Assistance of Counsel guaranteed by the Sixth Amendment. This right is sacred, a constitutional right supreme to all others. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984). But Mr. Hills gave up and outright abandoned his client at the formal sentence hearing.

b. Strategy.

The decision not to say anything at the formal sentence hearing cannot be rationally deemed a valid strategy. What possible strategic advantage ensued from counsel's silence? Mr. Hills' silence only worked to Petitioner's disadvantage because it implicitly indicated that there was nothing to be said on his behalf.

In light of the court's in-chambers announcement that it would be imposing the maximum sentence, Petitioner had everything to gain by Mr. Hills vigorously arguing – in a formal proceeding with the benefit of a record – for some type of leniency *after* raising all possible mitigating circumstances to help offset the aggravating circumstances raised by the

parties in chambers. Mr. Hills' silence was not strategic in nature because it could only work to his client's disadvantage.

2. *Resulting Prejudice.*

In the present case, prejudice was the rule rather than the exception. If there was a time or place where Petitioner needed the assistance of counsel the most, it was on judgment day.

The prejudice test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. at 694. This Court also stated,

> " . . . the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 696.

Mr. Hills negotiated a plea agreement, without any sentence concession, which allowed his client to plead guilty to a reduced charge that contained a potential life sentence (with the possibility of parole) from two charges that contained a mandatory life sentence (without the possibility of parole). The sentencing court had total discretion to sentence his client to any number of years or to the maximum sentence, life imprisonment. Petitioner was placed in a distinct disadvantage going into the court room on sentencing day

because there was no negotiated sentence concession and the sentence was open-ended.

Shortly after Petitioner entered the courtroom, Mr. Hills informed him that it was his "belief" that the judge would be imposing a life sentence. Mr. Hills was not straightforward about his "belief" nor did he mention the in-chambers conference that had just taken place. His conduct up to this point shows that he violated both his duty to be truthful and loyal to his client, and his duty to promptly inform his client of any developments in the proceedings. *Stickland v. Washington*, 466 U.S. at 688. Furthermore, when the formal sentence hearing commenced, he totally abandoned his client at the sentence hearing when he did not advocate by offering, citing or arguing any mitigating or extenuating circumstances.

The question, under *Strickland*, is whether there is a reasonable probability that the outcome would have been different if not for counsel's unprofessional errors or conduct. Since his client received the maximum possible sentence, life imprisonment, the only possible different outcome would have been a less severe sentence. Was there a likelihood that the judge could have been persuaded to impose a sentence with a range of years instead of a life sentence? Yes. But only *if* counsel would have taken the time and effort to properly raise and argue the existing mitigating and extenuating circumstances at the formal sentence hearing and argue for a sentence within a range of years.

What mitigating factors should have been raised at the sentence hearing? The most obvious factor was Petitioner's age at the time of the crimes. He was fifteen years old and a runaway from home. His family life was filled with the turmoil of off-and-on pending divorce proceedings, a father who drank excessively, and a mother who had a history of mental hospitalization. Petitioner, the fourth of six children, had no supervision, support or structure at home.

At the time of the crimes Petitioner was subject to the influences of his co-defendant who was thirteen years older,

had a criminal history and a prison record, and who was *very* manipulative. *See especially People v. Ranes*, 63 Mich. App. 498, 234 N.W.2d 673 (1975) (the co-defendant attempted to procure a "contract" to kill the Petitioner; solicited a witness "to say that Koster had been lying about defendant's involvement because of a deal made with the prosecution."). *See also People v. Ranes*, 58 Mich. App. 268, 227 N.W.2d 312 (1975) (A torn-up paper was found by a deputy in defendant's jail cell which contained a proposal to obtain a witness who for payment would falsely testify that she had been with defendant on night of killing).

Mr. Hills did not attempt to explain the psychological dynamics that led a vulnerable fifteen year old kid to become involved with a seasoned adult convict almost twice his age, a relationship that resulted in horrific crimes. He did not obtain a psychological evaluation that could have provided such an explanation while also setting forth his client's redeeming qualities and highlighting the prospects for rehabilitation – factors the judge was obligated to consider in determining the sentence. *Williams v. New York*, 337 U.S. 241, 248 n.13 (1949).

Another mitigating factor Mr. Hills did not raise with the Court was that his client had no history of violent behavior *before* meeting his co-defendant. His client did have a juvenile history of property crimes (car theft, breaking and entering, and possession of stolen property). He also had escaped from the juvenile detention home on two occasions. But his client had not exhibited any propensity for violent behavior.

Whatever Mr. Hills said at the sentence hearing would not have been detrimental to his client's prospects of getting a more favorable sentence than the maximum sentence he did receive. This is not an issue of hindsight because Mr. Hills *knew* the court's intention of imposing a life sentence. Mr. Hills' total abdication of his duty to advocate at the formal sentence hearing resulted in the ultimate prejudice to his client.

D. The *Cronic* Standard.

In *United States v. Cronic*, 466 U.S. 648 (1984), this Court set a standard for determining whether prejudice would be presumed for the purposes of the second prong of an effective assistance of counsel test.

Recently, in *Bell v. Cone*, 535 U.S. __ (2002), this Court addressed the application of the *Cronic* standard. It applies in three scenarios: 1) where there is a "complete denial of counsel;" 2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" and 3) "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected." Slip op., at 9.

Mr. Hills did not say a word in mitigation or cite any extenuating circumstances. Thus, he *completely* failed to subject the prosecution's case to meaningful adversarial testing at the formal sentence hearing. App. 91-95. This factual situation falls within the second scenario.

The judge's premature and improper announcement of the sentence in chambers also *prevented* counsel from effectively advocating on his client's behalf[4] at the sentence hearing and also *interfered* with counsel's ability to effectively make an independent decision on the issue of allocution. *See Strickland v. Washington*, 466 U.S. at 686. Mr. Hills was called upon "to render assistance under circumstances where competent counsel very likely could not." *United States v. Cronic*, 466 U.S. at 659-662. This factual situation falls within the third scenario.

In this case, prejudice is shown under either the *Strickland* or *Cronic* standard.

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[4]*See Cronic*, 466 U.S. at 659 n.25; *Bell v. Cone*, 535 U.S. __ (2002) (slip op., at 9, n.3).

Conclusion

Petitioner respectfully requests that this Court grant certiorari to formally review the preceding arguments.

Petitioner further requests that review be granted based upon the following reasons:

A. Reasons for Granting the Petition

This Court has recognized that approximately ninety percent of all convictions result from guilty pleas.[5] A constitutional standard for the taking of guilty pleas was set by this Court when it stated that a plea must be voluntary and an intelligent choice among the alternative courses of action open to the defendant. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Machibroda v. United States*, 368 U.S. 487, 493 (1962); *Kercheval v. United States*, 274 U.S. 220, 223 (1927). *See also Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

This Court also recognized that the sentence is of paramount importance to most criminal defendants.[6] This Court should finish the equation by addressing the right to be present and the right to heard at the sentencing process.

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[5]*See, e.g., Miranda v. Arizona*, 384 U.S. 436, 541, n.5 (1966) ("Stated differently, approximately 90% of all convictions resulted from guilty pleas."). *See also United States v. Akinsola*, 105 F.3d 331, 332 (7th Cir. 1997) ("Guilty pleas are to the criminal justice system what motor oil is to automobiles; you can't run one without the other. And guilty pleas are in abundance because the overwhelming majority of defendants (around 90 percent) resolve their cases without trials.").

[6]*See Brady v. United States*, 397 U.S. at 754 ("Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted.").

1. *Argument I.*

A trial court's ability to conduct in-chambers proceedings is an important tool of the judiciary because it allows informal discussions that would not otherwise occur on the record. Often, however, the fundamental rights of a defendant are at odds with this type of proceeding. The present case presents an opportunity to review these competing interests and establish minimum safeguards to protect those fundamental rights jeopardized by in-chambers pre-sentence conferences.

A sentencing court convenes in chambers for many reasons. Safeguards should be established to protect a defendant's fundamental right to be present and to be heard. This Court, in *United States v. Gagnon*, 470 U.S. 522 (1985), touched on this issue, but the bench and the bar need much more guidance on related questions: Should every proceeding conducted in chambers require the presence of counsel and the defendant? If not, under what circumstance is the absence of one or both constitutionally permissible?

What degree of latitude does the judiciary need in conducting this type of proceeding? Should this Court attach some minimum constitutional protections? Should notice be given to the parties when a pre-sentence investigator is present in chambers to discuss a sentence *ex parte*? Under what conditions should this Court require in- chambers conferences be held on the record?

Reviewing courts are often faced with disputed factual claims of in-chambers meetings and are left with no method for verification. Should this Court require these type of proceedings be on the record? If so, should all pre-sentence conferences be made part of the record, leaving the sentencing court with the discretion to seal a record containing sensitive discussions and issues? With a record, the reviewing court can ascertain the facts necessary to properly resolve legal claims.

These questions relate directly to due process guarantees of the sentencing process and its notice requirements.

Petitioner urges this Court to develop and adopt standards governing the practice and procedure of in-chambers conferences, especially those affecting the sentence.

2. *Argument II.*

A criminal defendant's constitutional right to be personally heard before the imposition of sentence is central to the criminal sentencing process in *non-capital* cases. This Court should revisit *Green v. United States*, 365 U.S. 301 (1961), and set a right-to-be-heard standard at sentence proceedings in non-capital criminal cases. This case presents unique facts that would allow this Court to set a standard while not placing an unworkable burden on the judiciary, because nearly all jurisdictions grant a defendant the right to allocution by either statute, court rule, or common law. *McGautha v. California*, 402 U.S. 183, 228 n.7 (1971). This Court has dealt extensively with sentence procedures in death penalty cases, but has yet to set standards for defendants appearing in "ordinary sentence" hearings throughout the nation.

Whether affirmatively denying a defendant an opportunity to speak during the sentence hearing rises to the level of a constitutional deprivation remains an open question. *See Hill v. United States*, 368 U.S. at 429 ("It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed."). Also, in *McGautha v. California*, 402 U.S. at 218, n.22, this Court repeated its statement in *Green* that "[t]he Court reserved the issue whether silencing a defendant who wished to speak would rise to that level." The Court also said: "We have not since had occasion to deal with this or related problems at length." This case presents an opportunity for the Court to establish minimum constitutional due process standards for

implementing a defendant's right to be heard at state *non-capital* sentence hearings.

3. *Argument III.*

There is an important and open question as to what standard should be applied for effective assistance of counsel questions in "ordinary sentencing" proceedings. As Justice O'Connor said in *Strickland v. Washington*, 466 U.S. at 686:

> We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance.

This Court should define the standard for constitutionally effective assistance at ordinary sentence hearings, especially those involving informal in-chambers proceedings where the standardless discretion of the sentencing court is most fully exercised.

For all these reasons, Petitioner Koster asks this Court to grant a writ of certiorari in this case.

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oOo

No. _____

In The
Supreme Court of the United States

BRENT E. KOSTER,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to
the Kalamazoo County Circuit Court

APPENDIX

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July 2002

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[1] STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v File# : D723-0140 FC

BRENT EUGENE KOSTER,
Defendant.
_____/

OPINION & ORDER DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court in the County of Kalamazoo, State of Michigan, on this 19th day of January, 2000.

PRESENT: HON. PHILIP D. SCHAEFER, Circuit Judge

Facts & Procedural History:

On June 11, 1975, Defendant pled guilty to one count of second-degree murder which occurred in 1972. Defendant was sentenced to life imprisonment on July 21, 1975. He currently is incarcerated at the Charles Egeler Correctional Facility, Jackson, Michigan. On October 29, 1992, the Hon. John Foley appointed counsel for Mr. Koster. Six years later, on October 19, 1998, Defendant filed the instant Motion for Relief fiom Judgment pursuant to MCR 6.500 *et seq*. The parties argued this case in court on December 7, 1999 in front of the Hon. Philip D. Schaefer, successor to the Hon. John

Foley.

Discussion:

Defendant claims that he is not required to establish good cause because he never exercised his right to appeal his conviction and sentence, and because he was convicted before the procedural bar found in MCR 6.508 was established. The Court finds otherwise. Defendant argues that he is **[2]**not bound by the good cause requirement of MCR 6.508(D)(3)(a) and relies on an unpublished opinion issued by the Court of Appeals in *People v. Harrington*, No. 188839, (Mich Ct. App, December 12 1995), *lv den* 450 Mich 1024 (1996). However, the Court finds that the Defendant's characterization of the *Harrington* opinion is inaccurate. Although the Court in its footnote to the opinion questioned the application of the good cause requirement, it nonetheless applied it to the defendant in that case. The Michigan Appellate Court did not reject or abolish the requirement, nor did it hold that it was not applicable where the defendant never had an initial appeal, as represented by Defendant. Further, what concerned the Court was not that the defendant never initiated an appeal, but that he never had the *opportunity* to appeal due to his mental illness.

Harrington is unlike the instant case. Here, the defendant was 18 years old when he was sentenced and it was evident that he understood his appellate rights. In March 1976, Defendant himself took action with the intent to pursue an appeal and actually filed motions with the Court of Appeals requesting relief in a Motion for Order to Show Cause and a Complaint for Writ of Superintending Control. Defendant was more than capable of seeking appellate relief. It was by his own choice that no appeal was taken, unlike the defendant in *Harrington*.

In addition, contrary to Defendant's argument that the procedural requirements of MCR 6.508(D) do not apply to him

because his conviction was entered prior to their creation in 1989, case law reflects strict enforcement of MCR 6.508, even retroactively, to defendants in Michigan. In *Thompson v. Elo*, 919 F. Supp. 1077, 1082 (ED Mich 1996), the federal court found that there were no constitutional problems in retroactively applying the rule where the petitioner did not show that he justifiably relied on past law or practice. Here, defendant alleges no such reliance.

[3]Thus, under MCR 6.508(D) the defendant bears the burden of establishing the entitlement to the relief requested. In relevant part, MCR 6.508 (D) provides that the court may not grant the motion if the motion:

> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> (II) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(III) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(IV) in the case of a challenge to the sentence, the sentence is invalid.

After 23 years after being sentenced, Defendant now alleges that he is entitled to relief because the terms of his plea agreement were not fulfilled and because the court deprived him of any benefit of his plea bargain. Defendant claims that he was effectively given the same sentence he would have received had he gone to trial and been convicted of First-Degree Murder. Therefore, defendant argues that his plea was illusory and he is entitled to be resentenced. The Defendant has failed to show good cause why he has not raised these grounds on a prior appeal in the last 23 years. In [4]addition, Defendant has failed to show actual prejudice that renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand. However, the Court has considered all arguments and rules accordingly.

I. DUE PROCESS CLAIMS

A. *Illusory Bargain*

The Defendant argues that his plea violated the principles of fundamental fairness and was involuntary insofar as the bargain was induced by a promise of leniency which the sentencing judge later rendered meaningless. Defendant requests a resentencing. To obtain relief from such a bargain, the MCR 6.508(D)(3)(b)(ii) declares that "the defect in the proceeding must be such that it renders the plea an involuntary one to a degree that it would be manifestly unjust

to allow the conviction to stand." A plea is involuntary unless the defendant knows the direct consequences of his plea, including the actual value of any commitments made to him. Defendant states that the implicit understanding was that defendant would eventually have a reasonable chance for parole even if sentenced to life imprisonment. Judge McCauley's written recommendation on the Record of Sentence states that defendant "never be released." Defendant contends that this violates the state's implicit promise in the plea agreement because it effectively eliminates any meaningful parole consideration and renders the plea bargain illusory. In fact, Defendant feels that he was punished for cooperating.

The Court disagrees. It amazes the court that the Defendant feels he was "punished" for the negotiated dismissal of *two* charges of first degree murder in exchange for his testimony against **[5]**Danny Ranes, an older co-defendant. Defendant received *one* second degree murder charge for his cooperation. Defendant was informed at the time of the plea that the agreement contained no sentence promises. Judge McCauley informed him that neither his attorney nor the prosecutor could plea bargain the sentence. Defendant received the benefit of the bargain.

Furthermore, Defendant is wrong in arguing that the lower court's verbal and written recommendation that he never be paroled has forever foreclosed any possibility of him being "meaningfully" considered for release by the parole board. According to statute, defendant is regularly interviewed by the parole board; any comments or objections from the sentencing judge or this court (successor), would be solicited and considered only after the parole board itself determined that it was interested enough to hold a public hearing concerning the possibility of releasing defendant on parole. MCL 791.234(6)(a)-(b). Defendant can not prove that he suffered any "actual prejudice" as a result of Judge McCauley's recommendation that he never be paroled since he

has not come to the level of having a public hearing. Therefore, Defendant's argument is not ripe for review.

Moreover, the sentencing judge in this case is no longer on the Bench. The undersigned is the third successor to Judge McCauley. At best, Judge McCauley's comments are an expression of *his* opinion of 23 years ago and can hardly bind the positions of future successors. Thus, Defendant's argument is specious.

B. *Lack of Individualized Sentencing*

Defendant states that his sentence is invalid because the sentencing court did not have a complete individualized history to aid it as the court failed to order a psychological evaluation. **[6]**Defendant alleges that a psychological evaluation would have shown that the Defendant needed rehabilitation instead of a life imprisonment sentence. Both parties cite to *People v. Lee*, 391 Mich 618, 639; 218 NW2d 655 (1974). In the *Lee* case the Michigan Supreme Court explained the importance of the sentencing court having complete information about the defendant before imposing his sentence. The Court determined that the sentencing court should have knowledge concerning a convicted defendant's past life, employment record, criminal record, psychiatric history, if any, and "mental and moral propensities." *Id.* The case explained that,

> The presentence report, mandatory for felony cases in Michigan since 1931, allows the court to make an informed judgment as to possibilities for rehabilitation, and to effectively utilize sentencing alternatives . . .. The presentence report has been widely regarded as an effective method of supplying information essential to an informed sentencing decision.

This case is no different. The sentencing judge had the presentence information for an individualized history. A psychiatric evaluation was not necessary because the presentence report had the vital information about Defendant's life. Defendant's claim is without merit.

C. *Denial of Allocution*

The basis of Defendant's argument that he was denied allocution stems from the 1975 practice that the judge and the attorneys hold an in-chambers conference before sentencing. Defendant's sentencing attorney, Mr. James Hills, testified that he argued his client's case to the judge for allocution at the in-chambers conference. Defendant argues that the judge made up his mind in chambers and there was nothing the Defendant could say that would make a difference. Defendant cites to *People v. McNeal*, 150 Mich App 85,90; 389 NW2d 708 (1985) for the premise that where [7]a trial court indicates, *prior to allocution*, that it has already determined the sentence it is going to impose, any subsequent allocution is rendered meaningless and requires a resentencing. Although the Court acknowledges this case, it is not helpful with the present situation. Here, the Judge never indicated before the in-chambers conference, in other words, *prior to allocution*, that he determined the sentence. The Defendant's trial attorney had the opportunity for allocution. **In fact, upon Defendant's request, Defendant had an in-chambers conference with the Judge also.**

Nevertheless, in 1975, holding an in-chambers presentence conference outside the presence of the defendant was considered a lawful practice, and that so long as the defendant was later given the opportunity to address the court during the formal sentence hearing, his right to allocution was not jeopardized or denied. *People v. Dumas*, 102 Mich App 196, 198; 301 NW2d 849 (1980). Defendant had the opportunity to address the court during his formal sentence hearing and

during his own in-chambers meeting. Defendant's argument is without merit.

II. JURISDICTIONAL ISSUES

The defendant argues that the juvenile court never acquired personal jurisdiction over defendant, thus depriving the circuit court of its jurisdiction. Defendant states that because he was held in custody for 4½ days before the juvenile court held a preliminary examination, he should have been released. However, Defendant was already in custody of the Kalamazoo Juvenile Home on a matter not related to this case at that time.

According to JCR 1969,4.2(A), if a juvenile was arrested and detained, the juvenile court was required to hold a preliminary hearing within 48 hours. The rule states:

> [8]Preliminary hearings as herein provided shall be conducted in all proceedings in which children are taken into custody prior to hearing and are not released to their parent or parents, guardian or custodian. In such instances the hearing shall be held not more than 48 hours after the child has been taken into court custody, not excluding weekends or holidays. Unless at such preliminary hearing the court shall find grounds for detention as set forth in Rule 3.1, or a proper custodian cannot be located, the child shall be released to the proper parent or parents, guardian, or custodian. [JCR 1969,4.2(A).]

Although the rule clearly requires that a preliminary hearing be held within 48 hours, it provides no consequence for failure to comply with that requirement. The purpose of the hearing is to timely assure, among other things,

entitlement to release on the pending charge. This purpose was rendered moot by the fact that the Defendant was already in custody on another charge. The rule only allows for a minor to be released if the court does not find grounds for detention or if a proper custodian cannot be located. This was not the case here. Not only was Defendant detained in the juvenile home for another matter and was not scheduled to be released, the Court ultimately found grounds for detention. The Defendant's claim is without merit.

III. CLAIMS INVOLVING COUNSEL

Defendant argues that his trial counsel, Mr. Hills, was ineffective during sentencing and at the appellate level. In Michigan, "a defendant claiming ineffective assistance based on defective performance has the burden of showing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different." *People v. Mitchell*, 454 Mich 145, 157-158; [9]560 NW2d 600 (1997). When applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and the defendant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id* at 156, quoting *Strickland v. Washington*, 466 US 668, 689; 104 S.Ct 2052; 80 L Ed 2d 674 (1984).

Defendant alleges that Mr. Hills was ineffective at sentencing for his failure to order a psychological evaluation and his failure to allocute on record. As stated earlier, a psychological evaluation was not necessary in lieu of the presentence report. Further, Mr. Hills submitted an affidavit stating that he argued before Judge McCauley at the presentence in-chambers conference. He said nothing further at the time of sentencing because the matter had been

allocuted and decided at the in-chambers conference and the Defendant himself had a chance for allocution with the Judge in chambers. The decision to allocute is a tactical or strategic one. *People v. Hughes*, 165 Mich App 548, 550[; 418 NW2d 913] (1987). Defendant's claims are without merit.

Defendant also alleges that Mr. Hills failed to appeal the jurisdiction question of whether the juvenile court properly obtained jurisdiction over the defendant. This failure to appeal the jurisdiction question is moot since there is no appealable issue.

Therefore, Defendant's Motion for Relief from Judgment is DENIED and this case is hereby closed.

IT IS SO ORDERED.

/s Philip D. Schaefer
Hon. Philip D. Schaefer
Circuit Judge

[1] STATE OF MICHIGAN
NINTH JUDICIAL CIRCUIT COURT
(KALAMAZOO COUNTY)

THE PEOPLE OF THE STATE OF MICHIGAN,
Kalamazoo Circuit Court
v File No.: B 723 00140 FY

BRENT KOSTER, Court of Appeals Docket
Defendant. No.: 158291
_____/

DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT
BEFORE THE HONORABLE PHILIP D. SCHAEFER,
CIRCUIT JUDGE
Kalamazoo, Michigan - Tuesday, December 7, 1999

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EXHIBITS: IDENTIFIED RECEIVED

None

[3]14:16:40

Kalamazoo, Michigan

Tuesday, December 7, 1999 - 14:16:40 p.m.

THE COURT: The Court calls the matter, of: The People of the State of Michigan versus Brent Koster, File 723 00140 FY.

Would counsel state their appearances for the record?

MS. DRAVES: Good afternoon, Your Honor. Heather Draves, Assistant Prosecuting Attorney, on behalf of the People.

MS. HUNTER: Good afternoon, Your Honor. Sarah Hunter, Assistant Defender, on behalf of Brent Koster.

I am from the State Appellate Defender Office.

THE COURT: All right.

Ms. Hunter, this is your motion for relief from judgment.

MS. HUNTER: That's correct, Your Honor. The Court ready to proceed?

THE COURT: Yes.

MS. HUNTER: Good after-- good afternoon, Your Honor.

I am from the State Appellate Defender Office.

I haven't met you before, but I am pleased to see - I was up here last week, and I am pleased to see that you are well.

[4] As you know, we are here to hear the oral arguments that have been ordered on this motion for post-judgment relief.

This Court's predecessor appointed the State Appellate Defender Office to represent Mr. Koster in 1992, pursuant to a letter that he wrote requesting appointment in pointing out problems that he finally learned of, I think probably through his work at Prison Legal Services, and learning law over the

years, and he felt he needed le-- legal representation.

As the Court is aware, Mr. Koster did not take an appeal from his original plea. Um, he just didn't do it.

His plea was in 1975.

And, obviously, the time for the direct appeal has passed.

I submit to the Court, at age 18 he did not know what he has not been advised. He cannot know law that he does not know about.

I would cite the case of Reinhart v. Brewer (phonetic spelling), an 8th Circuit case, that talks about that.

For whatever reason, he didn't take an appeal.

Now, today we have three issues to discuss that implicate the due process clause of the United States Constitution and Michigan Constitution Article I, Section 17., and a se-- another issue that implicates the 5th, [5]6th, and 14th Amendments, also Michigan Constitution 1963, Articles I., Sections 17. and 20.

Of course, we also need to discuss, because I know the Prosecutor's very concerned about it, the procedural mechanisms set forth in MCR 6.508D, and how they apply here, as we stand here in 1999.

I know the Prosecutor and I met last week. And, I know that the two of us disagree on this. And, it's our position that we do not need to make a showing of cause and prejudice under MCR 6.508D, as Ms. Draves has alleged.

Your Honor, before I begin, I just wanna say one thing briefly about this entire matter. I thought a long time before I came up here about what I wanted to say in this case. And, I've talked to many people in Kalamazoo about it. I, obviously, wasn't here for it. But, I - it's my understanding there is still a great deal of outrage and pain in this community over this case. And, I only wanna say that while there are no words we can convey about that loss we are not here to rekindle that. We're only here to ask this Court to do what its office is, and that is to apply the law.

This is a difficult case, Your Honor, also because of its notoriety, and because this Defendant was -- was considered, has been considered in the past the [6]perpetrator of one of the most evil crimes that's occurred in this area.

However, the Michigan Supreme Court, in People v. Lieska (phonetic spelling), that's at 161 Michigan 630, talked about that, saying that especially in cases where it appears that the respondent is unpopular in the community where his trial was held the Prosecutor and the Trial Judge are under a special responsibility to carefully act with fairness and responsibility.

That having been said, Your Honor, I briefly will go over the facts.

I know the Court has read the brief-- the briefs, and knows the facts of this case.

Just to set the framework for my argument, and for the organization of it;

My client was arrested in July, of 1972, for the brutal rape/murders of several women.

He was 15 years old when he committed the offenses, with a man nearly twice his age, named Danny Raynes.

In July, of 1975, he pled to one count of second-degree murder in exchange for his testimony against Mr. Raynes, which had already been given at the time of the plea.

[7]Also, for showing police the location of the body of one of the woman, that was part of the deal, which he di- he did comply with.

And, in return, the two counts of first-degree murder against him were dismissed.

The Prosecutor did not go forward on any third count.

And, he was permitted to plead to one count of second-degree murder.

We do not dispute Ms. Draves' contention that no promises, as to the sentence, were made to Mr. Koster as part of that bargain. It was a plea bargain. And, he was then 18, and told that plea -- told the consequences of pleading to second-

degree murder.

And, I wanna talk a little bit about the plea and sentence bargaining process that I think all of us -- I'm a former prosecutor. Ms. Draves is familiar with it, any officers in this courtroom, in this -- in this court are familiar with the relationship between plea and sentence bargaining.

Why do we plea bargain?

We all know why.

We plea bargain because the defendant is going to give us something, it benefits everyone in the system, there's a lot of discussion about that in the case of People v. Killibrew (phonetic spelling). That's a [8]Michigan case. Also, in Santibella v. New York (phonetic spelling). Most cases are disposed of by plea.

But, why do we plead?

When I was a prosecutor I had an assault murder case. And, I knocked it down to assault GBH. Why did I do it? Because of the sentence consequences. Because the parameters that the Court had to abide by legally, based on that kind of a plea, changed when I reduced that - when I would -- when I would reduce the charge, or move to reduce the charge, and the Court would accept the plea.

And, so the two are inextricably intertwined.

And, although no sentence promises can be made the Judge has legal parameters by which he must abide. And, I know this Court knows that. That's the benefit of pleading to second-degree murder, as opposed to first. This is done all the time.

Why do we do it? First-degree murder you can't get out, ever. If the Governor pardons you, maybe. That's not eve-- ever likely.

But, with second-degree murder you're gonna see the Parole Board. And, if you work real hard, and you do real well you -- you've got a chance, and that's what you bargain for. What -- that's what the meaning is to the defendant in plea-- in pleading.

[9]So, no. No sentence agreement was made, except that he would get a chance for parole.

Now, at the time, in the early '70s, I think this Court remembers that the thinking was, among the Bench and Bar, that it was better -- actually it's -- that thinking continued well into when I began practicing law, that it was better to plead just straight up to second-degree rather than get a term of years, because if you got 25 to whatever you were gonna have to do the 25, but if you - if you pled just to second-degree and got a life sentence you got to see the Board in 10 years. So, it was gonna be better to do that.

So, that was the thinking at the time.

And, Mr. Koster pled to second-degree murder then without a second sentence recommendation for a term of years.

We do not contend anyone held out a sentence promise to Mr. Koster, but he did live up to his end of the bargain in that he testified against Mr. Raynes, at risk to himself, because it's as is spelled out in the pre-sentence report here, and in the -- in an opinion in -- by the Michigan Court of Appeals, Mr. Raynes tried to hire a hit-man to kill Mr. Koster, to even to this day, and within the -- the last two months he's been, [10] basically, con-- threatened by Mr. Raynes. It's -- it's just never-ending.

He pointed out the body. He did that.

So, he did his part of the bargain.

Now, at his sentencing Mr. Raynes was by -- by the time he was sentenced he was 18. He did not know that the -- that the Judge had met with his attorney and the probation agent and the prosecutor and discussed his sentence. He did not know about that at the time.

What he did know though was that his attorney later came to him and said, Your sentence is gonna be life. I talked to the Judge.

Now, we could proffer this testimony if the Court wanted to hear it.

We do not know what happened in that meeting. We can only speculate. Mr. Hills' affidavit does not address it.

And, I could proffer testimony from Mr. Hills, to the extent that he assumes he would've advocated on Mr. Koster's behalf but he does not remember the substance of that meeting. So, we do not know if the appropriate factors were argued that have been set forth in People v. Snow (phonetic spelling) and Williams v. New York.

So, to the extent Ms. Draves has said to me, you know, there was allocution going on. It was just in [11]Chambers. I just don't think that on this record that we should speculate about that.

THE COURT: Wasn't that procedure commonly used, and had not been disapproved by the Supreme Court at that time?

MS. HUNTER: That's correct. However, it has since been disapproved.

THE COURT: Retroactively?

MS. HUNTER: I believe so. In People v. Berry (phonetic spelling)? And, I be1ieve that case is retro-- retroactive.

THE COURT: And, the remedy there is what?

MS. HUNTER: Re-sentencing, because one of the -- you know, the gravamen of allocution, and the Court knows this, is that not only that it happens but that it's meaningful, and that it addresses the factors that are of import and that have been set forth by the U.S. Supreme Court and the Michigan Supreme Court.

THE COURT: Now, I'm aware of all that counsel. And, I know -- I know there used to be these backroom meetings; as a defense attorney I participated in them. I'm well-aware that the Judge would convene a prosecutor and about eight defense attorneys for the eight to ten defendants who would be up that morning and away they go, and they discuss it.

[12]MS. HUNTER: That's correct. Right.

However, what happened in that meeting was that the

Judge determined the sentence before any in-court allocution had occurred. And, when a -- when a Court indicates prior to allocution that it's already determined the sentence that it's going to impose any subsequent allocution is meaningless and requires re-sentencing; and, that would be People v. McNeal (phonetic spelling), at 150 Mich App.

Now, we also know Mr. Koster took it upon himself to ask, at sentencing, the Judge, whether he could allocute in Chambers. His attorney didn't ask and the Judge didn't solicit it from him. He should not have --

THE COURT: Isn't your -- isn't your -- excuse me for interrupting. Isn't your client running a real risk for asking for re-sentencing?

MS. HUNTER: No.

THE COURT: No? Okay.

MS. HUNTER: Re-sentencing, he's not. He's already got a life sentence with a recommendation that's in writing.

THE COURT: Well, sentence could be 40 to 60 years. It's less than life.

[13]MS. HUNTER: Right. But, he's willing and exc- acceded to that risk. Based on discussions we've had he's willing to say it on the record.

THE COURT: Okay.

MS. HUNTER: And, we have discussed it.

Now, we don't know -- I don't know what Mr. -- I don't know all of what Mr. Koster said in Chambers when he went in. He just said he was 18 years old, that he knew that he was gonna get a life sentence. And, he had asked Judge McCully (phonetic spelling) why that was appropriate in light of the fact that he had kept his part of the bargain, and that the only real value of the -- to the bargain to him was the length of the sentence.

And, according to his affidavit, which is attached, Judge McCully responded in a heated manner that he was responsible for multiple deaths of such a heinous nature.

And, Mr. Koster told Judge McCully that was not much

of a bargain, and the conference was over. His attorney did not say anything.

That is what we have right now for the record.

And, if the Court wants to hear more about what happened at that conference --

THE COURT: No. I -- you know, I accept -- I mean, I'm -- I -- the -- we know what Judge McCully did. And, [14]-- and, I don't think anybody would greatly dispute Mr. Koster's recollection of the -- of the events.

Okay.

MS. HUNTER: Afterwards, the Judge came out, and added the following, contrary to statute, and beyond the province of his office, he sentenced Mr. Koster to life in prison, said he did not agree with the plea agreement, plea bargain, but he accepted it, and no less than four times he made it clear on the record that it was his recommendation that Mr. Raynes never be paroled and never be released from prison. He also wrote that recommendation on Mr. Koster's judgment of sentence. That was the end of it.

He also indicated his opinion that whatever he had - Mr. Koster had given as consideration wasn't that valuable, in his opinion, you know, testifying against Mr. Raynes. Even though later the -- the Michigan Supreme Court said it was absolutely critical to Mr. Raynes' conviction.

Now we know that, you know, we know that in Mr. Koster's mind I think there's enough -- there's some evidence that there's an ambiguity in his mind because, like I said earlier, plea and sentence bargains are intermingled. You know? At one point during his senten- sentence collo-- colloquy the Judge says, Do you know [15]there's no sentence promised to you? And, Mr. Koster, who's 18, says, Well, other than second-degree. So, he's somewhat confused. He thinks second-degree is a bargain for him. Now it is no longer because the Judge has tacked that recommendation on.

And, when he -- he comes out of court, and we've attached an article from the Kalamazoo Gaze-- Gazette, and it

says he admitted he was disappointed about the life term that he was given. He hoped to get a 15 to 25 year sentence, but it does carry a par-- parole consideration of 10 years, after 10 years.

Now, he did not appeal this, and the time to bring a direct appeal has come and gone.

Now, I think Ms. Draves is gonna argue there is nothing wrong with this picture at all, and we cannot show cause and prejudice, as required by MCR 6.508, so that we really shouldn't even be here, and no relief can be granted. She's a very good lawyer, but, Your Honor, she's mistaken under the law. And, I submit she is so mistaken that a federal court would not heed any opinion this Court issued if the Court based its opinion upon her logic.

I know Mr. Koster did not preserve or do what we call today exhaust these issues in a direct appeal during the time that he had to bring one because he didn't know about [16]any 6.500 procedure. There wasn't one then. So, at the time he wouldn't have been able to rely on it.

And, it was not a procedural rule firmly established. The case -- that's the case of Rogers v. Howes (phonetic spelling), 144 Fed 3d 990.

Also upheld in Firaza v. Tessmer (phonetic spelling). Also a -- that's a federal district court case.

Because he could not've had the foresight to have raised his claims any earlier the Court does not hold him to sh-- to a showing of cause and prejudice, and does not say, Oh, the issues are procedurally defaulted. It's nonsensical because we know that there was no procedural rule that's firmly established. So, he cannot procedurally default claims he does not even know that he can exhaust.

Now, the Prosecution relies on the case of Thompson v. Elowe (phonetic spelling), saying that he has procedurally defaulted the claims. However, Rogers v. Howes expressly declared that rule was no longer valid in footnote 5/ of that case. And, that is done.

The Prosecutor also cites to the case of the People against Ward, 459 Mich 602, 1999. That case does not apply here. It applies to prial -- prior collateral attacks on convictions, and not the effect of lack of a direct appeal on a 6.500 motion.

[17]In addition, it's a ne-- it was a new procedural court rule in 1989 when it was enacted. And, it was completely ... A committee was convened to draft it, and it is not retroactive anyway.

So, we submit that cause and prejudice need not be shown.

With respect to the argument about the jurisdictional defect in this brief, that argument does not require a showing of cause and prejudice under 6.508.

Finally, attacks on invalid sentences, which is essentially what this is under 6.508D, don't require any showing of prejudice .

So, to the extent -- Ms. Draves has had a lot of discussion with me about the fact that, Well, you know, the Judge may have said this but he wasn't prejudiced. Well, it doesn't matter. That does-- that is not relevant. If we show the sentence is invalid or ille- illegal in some fashion he has made his burden under 6.500 and should be re-sentenced. He does not have to show prejudice .

The due process violations that we're claiming, fundamental fairness was abridged under Santibella v. New York, which has been followed in Michigan. Santibella says that where a plea rests on a promise that is part of the inducement the promise must be fulfilled. The Judge [18]thwarted the promise, or the expectation, the heightened expectation that I'm gonna get out of that first-degree murder and I'm gonna get second-degree murder, and I'm gonna get a chance some day. I'm gonna get a chance to go to the Parole Board without the Judge prematurely precluding it. Otherwise, in any other circumstance the bargain's illusory and it violates due process.

THE COURT: How has he been precluded from the Parole Board, at this point in time?

MS. HUNTER: He has seen the Parole Board.

We have a letter from the Parole Board indicating that the Judge has written -- written it down and said, You should never be paroled. And, so that's gonna be a factor that's gonna be considered if you get past the interview before the Board up to the stage of the hearing, which is, by the way, procedurally where the Judge's recommendation comes in. Then they -- they should contact the Judge. And, the Judge should not be doing that at sentencing. And, I brought in two unpublished opinions about that, which I'll talk about later.

So, but, yes. They might look to it and make a decision.

And, we have a letter from 1996?

MR. KOSTER: '98.

[19]MS. HUNTER: -- '98, saying that that's gonna be a big factor in denying him parole.

Furthermore, it's illegal. Judge Corrigan (phonetic spelling) said that in the unpublished opinions that I brought. I know they're not binding but they're persuasive authority.

And, certainly, I think if this case goes to the Supreme Court Justice Corrigan is now there and she would follow what she wrote when she says,

> The Trial Court did not impose a non-parolable life sentence. However, the Trial Court's objection to defendant being paroled upon becoming eligible for parole at the sentencing is premature. And, because this error implicates defendant's future -- she says, because the error implicates defendant's future eligibility for parole -

THE COURT: Apparently the Parole Board doesn't accept that. . .

MS. HUNTER: Well, --

THE COURT: . . . because they're saying, We aren't

gonna do anything because the Judge said you shouldn't be paroled. -- but yet those unpublished opinions say that that statement by the Judge is a nullity, in any event.

MS. HUNTER: Well, they say it should be stricken.

THE COURT: Well, --

[20]MS. HUNTER: And, that's the remedy.

We're arguing the remedy is not only striking it but something more because of the due process violations.

And, we believe that our -- we have a letter from the -- someone from the Parole Board that -- who says it does affect sentence.

The promise must be fulfilled. He -- he -- Mr. Koster gave his part of the bargain. If you read the - the sentence colloquy in this case it's obvious that the Judge is concerned with one thing, and one thing only: he wants to punish this man. If he had the death penalty to use he would impose it. He wished he did, and he didn't so he couldn't have him killed so he was gonna do his best to see that he'd be locked up forever, prematurely, by the way, under the statute. And, that certainly had nothing to do with a plea to second-degree murder, which is parolable.

Again, the Prosecutor says it doesn't matter because the Parole Board doesn't use it anyway, and we can't show prejudice. Under MCR 6.508 all we have to show is an invalid or illegal sentence, not prejudice, and re-sentencing is the remedy.

I submit to you, Your Honor, it was an illegal sentence. It's -- and, it's tantamount to a first-degree murder sentence.

[21]Now, we do not have an affidavit from Mr. Koster as to what he was told that was gonna happen to him by the prosecutor, the police, and defense counsel during the plea negotiations, which were pretty extensive in making the decision that he was gonna go ahead and testify against Danny Raynes at some risk to his life. I can proffer that testimony if the Court wishes to hear it. It is not in the affidavit, however. But, I am willing to do that if the Court wishes to hear it.

In August, later, of -- I have in August, '95 the Parole Board sent a letter.

MR. KOSTER: '98.

MS. HUNTER: Ni-- Ni-- August, of '98. I'm sorry. In which they refer to the Court from the Judge.

Santibella says the remedy for the violation is to grant re-sentencing. And, because during the time that they discussed this plea, you know, and it's clear that at the time people thought you get to see the Parole Board in 10 years. You got a chance to get out. He did not know, and could not know the direct consequences of that plea bargain to second-degree murder, what the Judge was going to go in there and do, and try to circumvent the second-degree murder consequences. We submit then that the plea was not knowingly and intelligently made under In Re: Vale (phonetic spelling), and under Jaworski [22](phonetic spelling). Again, it offends due process of the United States Constitution. The remedy is re-sentencing.

Secondly, also in showing that this is an invalid sentence under 6.508D the Trial Judge failed to demonstrate, in any way, that he gave Mr. Koster at - what's called an, "Individualized sentence". And, that was the law at the time also.

There is nothing on the record, nothing in the pre-sentence investigation report that indicates that he did. It was the law at the time that he needed to do this.

And, the -- the case of Williams v. New York, which is a U.S. Supreme Court case, gives extensiv-- extensive discussion t o the fact that by the time we reach sentencing we aren't focusing on the crime only because we've dealt with that by plea or by trial.

What we are focusing on is the offender. And, we need to understand the offender and have a -- have a good understanding of the offender, even to the extent that the Court should reach out outside the pre-sentence, or whatever resources it has, and garner other resources to understand this

individual in making this sentence.

Now, in People v. Snow the Michigan Supreme Court adopted that reasoning, saying that there's a duty to individualize the sentence that's -- that is a -- that has **[23]**due process implications -- excuse me, Your Honor. I have a sore throat. -- and that the four factors, are: Refer- reformation of the offender, very important, protection from society, important, disciplining the wrongdoer, and deterrence.

But, we must gather information about the offender.

Now, from -- from the sentence colloquy we can't see anything like that. All the Court does is discipline, punish Mr. Koster and tell him what a bad person he is. Doesn't even matter that he testified against Danny Raynes, at some risk to his life, to the Judge, and that he wishes, if he could, he could give him the death penalty.

That is not the law in the State of Michigan when a Judge is sentencing someone. And, that was not the law at the time.

MCL 771.14 also says the sentence must be individualized or it is invalid, and it must be tailored to the circumstances of the case and to the offender. And, if the person is a young adult, under McFarlane (phonetic spelling), at 38-- 389 Mich 557, 1973, that was the law at the time also. The Court has even a heightened, more of a duty to individualize that sentence and find out ab-- and, what that means is find out about that offender to understand what happened; understand: Is this person capable of rehabilitation or not?

[24]Got a very young person here.

There is no consideration on this record of reformation whatsoever. If anything, all it is is just punishment. The Judge, we submit, should've reached beyond the pre-sentence investigation report, which is largely a rehash of not only the crimes in this case, but of Mr. Koster's juvenile history. Talks a little bit about some chaos in his home, foster care placement, but it does not penetrate this individual, in any way, shape or form, like a psychological report could've done.

Now, again, the Williams v. New York case says you get -- when you got a offender you should each beyond what's right in front of you.

McFarlane says you have a higher duty, you -- you even have a higher duty to do that with a young offender.

We submit that when someone does a crime that heinous at the age of 15 it is very important to understand that they can be rehabilitated. The Judge did not care and did not indivi-- individualize this sentence. Therefore, he must be re-sentenced, that's the remedy, so that the proper criteria can be employed. And, as we know under Coles today the Court must do that on the record, and show that -- show each -- the consideration of each factor, and get complete and detailed information about the offender.

[25]Again, we -- on -- because of Williams v. New York this is -- this invalidates the sentence, People v. Snow. No need to show prejudice under MCR 6.500. That's an exception.

Finally, Your Honor, before I rest on my brief on some of the remaining issues I wanna discuss the issue of the allocution.

I know this Court has said that it understands what happened here, but I'd like to talk a little bit about the law because that's what we're here for.

The Judge -- the Judge hated Mr. Koster, I think that's just the bottom line, because he did something hateful and he wanted to hurt him as hard as he could. He levied that sentence before any alloc- allocution, excuse me. And, besides, we can't see from the record what allocution happened. For all we know, I've been in Chambers plenty of times where I was cutoff by a -- a Judge, and told, I don't wanna hear it. This is the sentence. So, we don't know what happened. We can proffer testimony from Mr. Hills, but I grant you, he's gonna say he doesn't remember.

My client did not learn about this until 1998. He did not learn -- he knew that -- he knew that Mr. Hills already knew he was getting life but he didn't know there had been

this conference until 1998.

[26]And, again, I submit, there's been a lo-- a lot of complaining about the time that it took for the State Appellate Defender Office to reach a strategy in this case and file the 6.500 motion. That is one of the factors; developing the strategy. There's no statute of limitations on it, on 6.500. And, I believe in Chambers I discussed with the Court the fact that there was a lot of back and forth about what strategy was going to be used in this case for -- on his behalf, and which issues should be discarded.

Then, in 1998 we were still gathering information. Still gathering information.

I was even still gathering information on this case, Your Honor, up until last week.

And, so I don't think there's anything in 6.500 that says that you cannot take the time to develop your strategy to fully and fairly present the issues. -- which is what the Federal Court is going to require, if he has to go there, for habeas corpus relief, or they're gonna send it back here and say that the State Court didn't give us the chance to do that.

Now, the main case about allocution in Michigan is that if a Court indicates before allocution happens that it's already determined the sentence any subsequent allocution is meaningless.

[27]So, even though I submit there wasn't any meaningful allocution the timing of the allocution already invalidates the sentence. That's People v. McNeal.

But, the main case is Barry, which I claimed earlier, is retroactive. I thi-- I believe that was out of this court. Same type of situation. . .

MR. KOSTER: Involving Mr. Hills.

MS. HUNTER: Involving Mr. Hills.

But, even more importantly, going back into Chambers and not having a record of what happened so that we can't know what happened to the defendant's heightened expectation.

And, in Barry they said the remedy is re-sentencing to allow some kind of meaningful allocution because the Court has to consider the allocution before levying sentence and before making that decision. And, it has to be meaningful.

Now, even though we don't know if prejudice resulted we need a record to look at. That's People v. Matzat.

Is that how you say it?

MR. KOSTER: (no response)

MS. HUNTER: I don't know.

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We can say, Well, you know, he wasn't prejudiced. - except that in all the cases where they talk about, Well, [28]he wasn't prejudiced. -- they have some kind of record where people came out and allocuted.

In this case, we have secrecy. We have behind-the-doors. And, we do not know, and we cannot speculate. We don't speculate.

Again, that renders the sentence invalid. And, the remedy is re-sentencing.

Now, I would submit -- submit to the Court, as to the jurisdictional issue, jurisdictional issues do not require a showing of cause and prejudice under 6.508D. For the record, I rest on my brief, as to that issue.

Moreover, Your Honor, as to the issue of ineffective assistance of counsel, I rest on my brief, and indicate that it is a claim of ineffective assistance, as a matter of law; but, if the Court wishes to order testimony on that issue we would abide by the Court's order.

THE COURT: Did I understand you're claiming ineffective assistance of counsel because Mr. Hills did not take an appeal? Is that -- did I read that somewhere?

MS. HUNTER: That is not my position.

THE COURT: Okay.

MS. HUNTER: Excuse me, Your Honor.

(At 14:55:19, brief pause in this proceeding)

(At 14:55:35, this proceeding continued)

[29]MS. HUNTER: For the record, we've alleged ineffective assistance of counsel under the Sixth Amendment of the United States Con-- Constitution on several grounds, you know, that Mr. Hills should have rendered allo-- made allocution meaningful. It was rendered meaningless. He should've assisted; this man was 18 years old, in helping him understand the process, and what was going to happen to him, and what had happened to his sentence, and the prejudice that ha-- that was gonna inure to him as a result of that conference that had happened. He didn't even know about the conference. He cannot know what his attorney doesn't tell him. That's Reinhart v. Brewer. We cite that all the time. He relies on him to tell him that.

My voice, I'm losing it.

Allocution is a critical stage of the proceedings, under People v. Mvles (phonetic spelling), at 454 Michigan 90, at which he has a Sixth Amendment right to be represented by counsel.

While we know there's no specific sentence agreement the -- the . . . of counsel was not only silent on the record but he was silent to his client, as to what had happened to his expectation for the second-degree murder plea. And, here he is in the middle of sentencing, asking to allocute himself. His attorney doesn't even advise [30]him, Mr. Koster, you have a right to allocute. You can do it. He had to ask for it himself.

He did not utter a single word in mitigation, extenuation or defense of Mr. Koster, and that is part of his duty at sentencing so that the sentence is based on reliable information. In the cases Townsen v. Burke (phonetic spelling), 334 U.S. 736, United States v. Tucker
also. There were unique circumstances in his case that should've been brought to the Court's attention. And, the cou- - the counsel's silence at the sentencing was, in a sense, worse than having no counsel because it was as if he was implicitly

agreeing with what the Court was doing.

Importantly, also, was this failure to communicate, in any way, with Mr. Koster, to meet with him, to encourage him to speak on his own behalf, to stop the proceedings and say, Your Honor, the Court . . . needs to speak. He just didn't say a thing on a case that was of a huge magnitude, huge, enormous magnitude to people in this community.

You know, the laws were so important when it came to prosecuting the offenders for the victims. The law was followed for the victims because that's what the law is for. The law was not followed for the Defendant. It was not. And, this is, in our country, we don't tolerate [31]that, regardless, again, is -- as in the case of Lieska. We have to be extra careful to follow the law.

Didn't even investigate prior to sentencing, and have a psychological evaluation done to at least try to illuminate for the Court how this could've happened, how a 15-year-old person could have done this and be-- and become involved in such a heinous crime.

And, I submit to the Court, we have proffered a psychological evaluation, but there is other evidence that could be tendered in a hearing that would explain this, based on, I think, some famous criminologists who have written on this subject, older people teaching crime to younger people who have no -- no adult guidance in their lives. All kinds of things could've been brought to the Court's attention.

We are not saying, Feel sorry for him. We are saying, Understand him.

We are not asking for a pity party. We are asking that under the law his sentence has to be individualized, and he has to be understood as a person; that's what the United States Supreme Court says, and that's what counsel's job is under the Sixth Amendment.

Excuse me, Your Honor. I have a sore throat. May I confer with my client for a minute?

(At 15:00:52, brief pause in this proceeding)
[32](At 15:01:01, this proceeding continued)

MS. HUNTER: Your Honor, at this time, I rest on my brief, as to the remain-- remainder of the issues. I would like to just say to the Court that I know this is a difficult case for everybody, that it probably would not be popular or the -- or -- or a good thing in this community to announce that Mr. Cos-- Brent Koster got a re-sentencing. And, we are not asking for the world. We're asking for a fair sentencing hearing that complies with the law in this country.

Justice can be hard. H.L. Minkin (phonetic spelling) said, Injustice is easy to bear. What stings is justice. And, I submit to the Court that while this is difficult to do, maybe unpalatable to the Court, the law commands that my client be re-sentenced.

And, Your Honor, if the Court please, if Ms. Draves raises new issues I would ask for rebuttal, as to new issues.

THE COURT: The reason I raise the issue of appellate performance, it appears to be in – in paragraph 61. of – of your motion.

MS. HUNTER: Then I -- then I am mistaken, Your Honor. Excuse me.

MR. KOSTER: Sarah? Sarah?

MS. HUNTER: Thanks.

[33]Is he appointed? Do you know? Is he appointed?

MR. KOSTER: No.

MS. HUNTER: Well, I submit, you -- you -- you know, Your Honor, the Defendant is not suffering a procedural default.

Yes?

Jurisdictional issues cannot be defaulted. But, to -- to the extent that they can again . . . preserve the claim in paragraph 61., as to the jurisdictional issue.

Excuse me.

(At 15:03:38, brief pause in this proceeding)
(At 15:04:00, this proceeding continued)

MS. HUNTER: I submit to the Court that counsel was ineffective for not pursuing that issue under the Sixth Amendment because the issue was procedurally defaulted because there was no appeal of the Juvenile Court jurisdiction issue.

And, I believe that concludes our argument.

I do apologize to the Court for overlooking that.

THE COURT: All right.

All right. Ms. Draves, your response?

MS. DRAVES: Good afternoon, Your Honor.

I'd first offer to this Court the irony of the fact that Ms. Hunter has stood up here and indicated that this Court need not follow 6.500, that it need not -- her [34]client need not serve, or establish good cause and prejudice under 6.500. Glancing through the Defendant's motion, the very first paragraph that the motion is presented to the Court, indicates that he is seeking relief pursuant to 6.500. And, throughout Ms. Hunter's argument she has made reference to 6.500 and subsequent rules in that section.

I adamantly oppose her -- any claim made by the Defendant that he is not subject to the good cause requirement or the prejudice prong of 6.500.

Defendant was convicted and sentenced in 1975. That's 24 years ago.

His appellate rights have long past.

And, according to 6.501, that's MCR 6.501, the rule specifically states that a judgment of conviction and sentence not subject to appellate review may only be reviewed in accordance with the provisions of the subchapter. Therefore, the Court is held by the requirements of 6.500.

Also, the Supreme Court, in People v. Reed (phonetic spelling), 449 Mich 375, a 1995 case, indicated that post-judgment relief is an extraordinary relief in that it -- it should

only be granted in cases where there is a miscarriage of justice.

[35]I would also point out to the Court that 6.500 cases are considered collateral. They are consi- post-conviction motions are considered collateral attacks on a conviction. And, that is specifically referred to - tho-- that -- that specific language is used by the Michigan Supreme Court in People v. Reed also.

And, another point to make mention of is the fact that the Defendant's argument he -- he relies on case law as if he were convicted yesterday. And, under the - under Michigan law it is very clear that a defendant is subject to the state of the law at the time he was convicted.

And, also, in People v. Reed the Supreme Court noted that collateral post-conviction remedy should have a narrower role than a direct appeal.

Therefore, it's like this Court is stepping back one more step.

The defendant has to prove prejudice.

He has to prove good cause.

And, in -- under 6.508, Subsection D3, it indicates that the Defendant bears the burden of proving that he's entitled to relief.

And, it also forbids this Court from granting any type of relief if the emotion alleges grounds that could have been raised on appeal or in a prior motion.

[36]The operative word there is could. Could've been raised. And, the Defendant has claimed, in oral argument here today, that I'm not subject to that requirement. I don't have to prove good cause. But, the rule indicates that if a motion alleges grounds which could have been raised the defendant is not entitled to release unless - or relief unless he also demonstrates why he failed to raise these issues earlier, and actual prejudice from the alleged irregularities.

It's important to note that not only has Defendant disclaimed any requirement of having to establish good cause there is not one word said about good cause in the body of the

brief that's been presented to this Court. There is vary few allegations pertaining to good cause in the motion itself. And, I would submit to the Court that they're very vague in each one of them,

One being that he's not required to prove good cause because it doesn't apply to him because he never had an appeal.

Another allegation is that good cause doesn't re--apply to him because the rule establishing that requirement was promulgated in 1989. He was convicted in 1975. Therefore, it wasn't in existence. It doesn't apply to him.

[37]And, his third allegation is he was only 15. And, although Ms. Hunter has corrected that in oral argument, indicating, and using the age of 18, which I would point out to the Court that although he was arrested at 15 he was convicted and sentenced at the age of 18.

Defendant has failed to establish, nor can I even venture to guess any reason that would justify him waiting 23 years to raise these issues.

Ms. Hunter has indicated that the rule doesn't prohibit them from developing a strategy, holding the case to develop a strategy. I would indicate to the Court that the strategy seems to be that, We'll wait until the law favors us and then we'll present an issue.

But, as to Defendant's claim that good cause does not apply to him, the law refutes his first two claims, one that doesn't apply because he never took an initial appeal, and that it was established after he was convicted.

And, the -- the record clearly refutes the third one, that he was too young to appreciate the importance of appellate process.

First, as I've indicated in my brief, and I'll only touch on briefly here, in People v. Ward, that's a Supreme Court case decided in 1999, the defendant pled guilty to OUIL in February, of '95. He never appealed.

[38]Fourteen months later he filed a motion to set aside

the plea. And, although the Court, the Supreme Court did not couch this in terms of 6.500 by analogy, because the 6.500 is a -- a collateral attack, as indicated by the Court in Reed, I think it's very significant for this Court to note that the Supreme Court did indicate that a delay in bringing a motion like that is a factor that the Trial Court must consider, that it's entirely proper and appropriate that a much higher standard be applied to the Defendant. And, in that case, it was only a 14-month delay. Here, we have a 23-plus year delay.

And, also, in a relatively new case by the Michigan Supreme Court that I've noted to counsel prior to oral argument today is the case of People v. Agasaki -- or I'm sorry, Osaqhae. That's spelled O-S-A-G-H-A-E. And, that's found at 460 Mich 529. And, that's also a 1999 case.

In that case the defendant pled guilty in 1992. And, he, too, never took a -- an appeal to the higher court. Five years later he filed a motion for relief from judgment.

While Ward was not specifically speaking about 6.500 this case does. We have a defendant who pled in 1992. He never takes an appeal, and then 5 lays -- 5 years later he files a motion for relief from judgment. And, in that [39]case both the Supreme Court and the Court of Appeals apply the good cause and prejudice requirements of 6.508. In fact, what I found significant in that case is that within the body of that opinion is a section of the Court of Appeals opinion. And, in that the Court of Appeals held, quote, or,

> That defendant, quote, could have raised on appeal his claim that he was not advised of his right to testify.
> End quote.
> However, quote, defendant cold not raise the deport-- deportation issue until federal law was amended and -- and a bill was signed into law.
> End quote.
> -- after he was convicted.

So, here we have a defendant who takes no initial appeal, but after filing a -- a post-conviction motion the requirements of 6.508 are applied to him.

And, the Court even here gives us kind of an instruction on what could have been raised and what the defendant could not have been expected to have raised. We have a change in the law in one of the issues.

The Supreme Court agreed, and they, the Supreme Court, held that, quote,

> [40]High thresholds must be cleared if a defendant seeks to withdraw a plea after a lengthy delay.

They're talking about prejudice.

They're talking about good cause.

And, I would ask the Court to look at that case in considering whether those elements or requirements are applicable to the Defendant in this case.

Second, with respect to Defendant's claim that the re-- good cause requirement and the prejudice element do not apply to him because he was convicted in '75, and the rule wasn't promulgated until 1989, I would point out that in People v. Carpentier (phonetic spelling), 446 Mich 19, it's a 1994 case, I'm sure the Court is well-aware of that case, as most practitioners in this appellate law are. It's a very popular Michigan Supreme Court case, and it's also instrumental in creating a large part of 6.500 jurisprudence.

In that case the Supreme Court goes into great deal about what's required of good cause and what's required of prejudice. And, in that case I found it significant that in a case that's revered as very instrumental in this area of the law the Defendant was convicted in 1983 before the 6.500 rule was enacted. Supreme Court held in that case, quote,

> [41]There appears to be no good cause for the nearly decade long delay in defendant's collateral

attack. Again, 6.500 motions refer to this collateral attack. And, also, they indicated, quote,

No good cause exists when a delay occurs because of defendant's own conduct.

End quote.

Finally, with respect to the Defendant's age preve--as preventing him from exercising his timely right to appeal, and that he -- his claims that he didn't understand the process, I would indicate that the record clearly refutes that.

The Defendant was 15 when he was arrested. That seems young. Yeah. That's what usually stuns every person that's touched this case. However, this wasn't the first time the Defendant was in trouble with the law. Unfortunately, Mr. Koster was very acquainted with the legal system, even at the young age of 15.

And, it was at 18 that he was convicted and sentenced.

The record is replete with dialog, both between the Court and the Defendant during the plea and the sentencing, well, mostly during the plea transcript.

[42]And, also, there was facts on the record that indicate that the Defendant was familiar with the legal process.

He was aware of his right to appeal, that was told to him more than once during -- once during the plea tran-transcript, another during the sentencing. And, I've cited those portions of the transcript to the Court in my brief. And, also, at the end of the sentencing transcript, when he was informed of his appellate rights he was also informed that he had a right to an appellate attorney.

The Defendant wasn't expected at the age of 18 to draft his own appeal. He had the right to an attorney, and he knew that.

He retained counsel to seek re-- protection from the Court when he was only 15 years old, with respect to these murder charges.

And, another thing, even though the Defendant wasn't

expected to pursue an appeal on his own I find it interesting that he tried. He filed several motions with the Court of Appeals for superintending control, something that I think a lot of seasoned lawyers don't even understand. And, I think that the record, anyway, is very significant in showing that the Defendant was aware of his appellate rights.

[43]And, also, I think it's significant the fact that he was waived over from Juvenile Court to adult court: that, in and of itself, indicates that a Court has determined that he's -- his faculties and his maturity level is significant enough, or sufficient enough that he be tried as an adult. His behavior was that of an adult, and he was found to be fit to be tried and held accountable as an adult.

I would submit to this Court that the purpose the Defendant did not appeal in 1975, or shortly thereafter, was because he didn't want to. And, that's evidenced by his comments to the Gazette reporter in 1975. He had no intention on taking an appeal. And, that article's been attached to the Defendant's own brief.

So, with that aside, I would indicate that the Defendant is subject to the good cause requirement of 6.508, and he's also subject to the prejudicial prong.

And, I have not heard anything convincing today, nor is there anything contained in the brief that explains the 25 years that have passed. And, Defendant can't account for this time. And, I believe that the Court could deny this motion on that ground alone.

But, moving on to the prejudicial aspects of Defendant's arguments, his first is that he was denied the only benefit to his plea, and the -- because Judge [44]McCully, when sentencing him, wrote in on the bottom of his judgment of sentence that he recommended he never be paroled.

As Defendant has indicated, or conceded, he was not promised anything, with respect to a sentence. And, I think that that's clear on the record. I've cited those portions in my brief also.

He does indicate though today that it was implicit in his mind that by virtue of entering a plea to a -- a lesser crime that you're gonna get something better, that the second-degree murder sentence would be obv- obviously better than the first.

I'd point out the fact that in the sentencing transcript, I'm sorry, in the plea transcript the Court specifically informed the Defendant, and this is on page 13 of the -- the plea transcript, the Court indicates,

> I want it very clear on the record that the prosecuting attorney and your attorney, Mr. Hills, neither of those can plea bargain a sentence. That is exclusively the right of the Court. They could tell you anything they want about this sentence, and I'm not bound by anything they say, as far as the sentence is concerned. If they have made an understanding or a plea bargain with you, Ms. Koster, as to other charges, recommending that the Court **[45]**accept a second-degree plea rather -- rather than going to trial in the first-degree murder, that is part of the plea bargain. The prosecutor and your attorney may agree to those things, they may not agree to any sentencing. That is the -- that is exclusively my prerogative, as the Judge. Do you understand that?
>
> The Defendant indicates, Yes.
>
> On page 14 the Court indicates,
>
> Okay. Do you understand there are no agreements as to the -- as to leniency? If you stand trial or plead guilty you will be treated, as far as I am concerned, equally. Whether you stand trial or whether you plead makes no difference to me, as far as sentencing is concerned. Do you understand that?
>
> The Defendant answers, Yes.

The Defendant's claim here today that he entered his plea unknowingly and -- and unintelligently is completely refuted by the record.

In fact, at the -- before the Judge -- Judge McCully

accepted his plea in this case he even gave a chance for the Defendant to back out, and he still went forward with it.

And, as far as any claim that he didn't expect to get a life sentence, considering that he had given a benefit [46]to the Prosecutor's Office in exchange for his testimony, I would point out the fact that there's a 3-year delay between when the Defendant was arrested and when he was sentenced. During that time he did testify against his co-Defendant, Danny Raynes.

There were four women killed in this instance, or related to this instance, Mr. Koster has admitted to being involved with three of them. He testified against Mr. Danny Raynes, his co-Defendant, in two cases, that were unrelated to the ones that are involved in this case.

After he testified against his co-Defendant Danny Raynes entered second-degree murder pleas, or guilty pleas to second-degree murder, with respect to the same two women that Mr. Koster was charged with. And, guess what? He got life sentences.

It was after that that Mr. Koster entered his plea and was sentenced for his second-degree plea.

I don't think that it's unreasonable to assume that because his co-Defendant who pled guilty to second-degree was received a life sentence that he would too. I don't see the big surprise in that.

With respect, too, to the fact that Mr. -- or Judge McCully . . . the only benefit the Defendant was to receive, I've cited several cases in my brief to indicate that, or to support the -- the fact that even if Judge McCully, his [47]recommendation had the effect of giving him a non-parolable life sentence that that doesn't result in his plea being illusory.

But, before we even get to that point I'd ask the Court to look at the fact that we haven't even gotten to the point where we even know whether Judge McCully's recommendation has perpetrated any prejudice on the

Defendant.

As Ms. Hunter has noted, the -- the process for parole is that, first, the Parole Board has to be interested in parole. And, after a majority of the Parole Board is interested in paroling a -- a defendant, any defendant, it is only then that a notice of public hearing is issued, and a recommendation is solicited from the - either the sentencing Judge or his successor.

In this case, as evidenced by comments or letter --and letters made from the Parole Board, specifically Hudson (phonetic spelling), that I've attached to my brief, a letter from William Hudson, who was then the Chairman of the Parole Board, he drafted a letter to the Defendant in June, of 1986. And, at that time, he indicated the process to the Defendant. He explained the process to the Defendant. And, that's been attached to my brief as an Appendix.

[48]And, also, if the Court were to look at Robert Gach, -- I'm not knowing if I'm pronouncing his last name correctly, it's G-A-C-H. -- he explained the process to Ms. Valerie Newman, who represented SADO. And, that was back in March, of 1996.

He specifically explained to Ms. Newman that it wasn't because of the -- the Judge's recommendation that Defendant wasn't being considered for parole. It was because the crimes that he committed were heinous. And, that letter, too, is attached to my brief.

Therefore, the fact that the Parole Board hasn't even, itself, been interested in paroling the Defendant hasn't even gotten to the point where they're even interested in pursuing a -- a public hearing. I would argue that Defendant is merely speculating on the effect that Judge McCully's recommendation would have on his eligibility for parole.

The Defendant has submitted two unpublished cases today to the Court, they're -- wherein, the Court of Appeals justi-- Judges have indicated that such a written recommendation is illegal. Well, I'd note to the Court, too, that

those cases involve a defendant's initial appeal. The standards are different. This Defendant is bringing this issue 20-some years later. The standard is farther removed. He hasn't even shown good cause, let [49]alone showing prejudice. He has no -- shown no prejudice, and he is subject to show prejudice. He is required to show that.

Nonetheless, as I had -- had mentioned previously, even if Mr. -- or Judge McCully's recommendation forever closed any possibility of parole there are two cases that indicate that such a sentence would not render his plea illusory. And, I have cited those in my brief; specifically, Clark, People v. Clark, 141 Mich App, page 1, 1985 case; and, People v. Peters. That's at nin-- 95 Mich App 589. And, that's a 1980 case. In that -- in those cases the Defendant, I -- I -- I believe it was in the Clark case the -- the defendant re-- received a similar sentence.

And, I would just like to quote part of that for the oral record today. In Clark the defendant argued,

> As a matter of policy, a sentencing Judge shall allow a defendant the opportunity to withdraw his plea of guilty to second-degree murder, where as here, the plea was obtained in exchange for the dismissal of the first-degree murder charge and the Judge nevertheless intends to oppose a non-parolable life sentence.

The Court disagreed. They saw no problem with that. They held that the defendant's bargain was not illusory. [50]The Court said, There is no sentence agreement. There has been no promises made to the Defendant. And, they also found that the plea was not illusory because the defendant did receive a bargain out of the plea. There was a dismissal of the first-degree murder charge.

And, I would point out to this Court that not only did the Defendant in this case have the dismissal of -- of first-degree murder charge, he had the dismissal of two.

And, he was also protected from being prosecuted from any other crimes related to this instant -- incident. And, that's specifically noted in Prosecutor Burch's (phonetic spelling) letter to Mr. Hills that's been attached to the Defendant's brief, that we, the Prosecutor's Office, would forego prosecuting the Defendant on any other crimes that he happened to admit to or bring up during his negotiations or discussions with the police. And, that's significant because it was later determined that Defendant was involved with the murder of a third woman.

And, so, I would argue that the Defendant received a huge benefit here. He pled to one degree -- one count of second-degree murder. He had three of 'em that he - three counts of first-degree murder that could've been brought against him.

His plea was not illusory.

[51]His bargain was not illusory.

He went into this with his eyes open.

He knew the Court was the only one that could determine his sentence, and he still entered his plea.

And, he was -- a lawful sentence was imposed by Judge McCully.

With respect to the Defendant's second claim that the Court was remiss in -- or had erred in failing to order a psychological evaluation, I'm gonna rest principally on my brief on this issue. There's nothing in the law that requires the Court to order a psychological evaluation.

And, even -- even reviewing Dr. Brooks' evaluation that's been submitted to this Court as an appendix to the Defendant's brief, it -- it shows that even had the Court ordered a psychological evaluation, as Defendant has urged that it should have, Judge McCully wouldn't have been looking at a per-- personal profile of the Defendant any different than was apparent in the record in 1975.

The pre-sentence investigation report was very sub-- was sufficient and went into great detail about Defendant's

personal life, his home life, his criminal history. And, the pre-sentence investigation report indicated that he was, or I -- revealed that he was a key player, and not the passive use -- youth that he wants [52]this Court to believe that he was, and that he had a long juvenile history:

Seventeen or more auto thefts.

He had numerous breaking and enterings.

He admitted to drug use.

And, the pre-- pre-sentence investigation report, the history of the Defendant, also shows that he wasn't subjected to an overbearing, elderly co-Defendant. This was -- these murders were just a culmination of Defendant's -- an escalating pattern of his criminal behavior.

Defendant went into this. He made his own decisions.

And, not only did the possibility of rehabilitation look slim in 1975 Dr. Brooks even indicates in his evaluation that he won't even venture a guess.

THE COURT: Ms. Draves, is this the part of your argument you weren't gonna comment any further on?

MS. DRAVES: Yeah.

THE COURT: Okay.

MS. DRAVES: That he wasn't going to even venture a . . .

THE COURT: Move -- do you wanna move on?

MS. DRAVES: . . .guess to when the Defendant could be rehabilitated because --

THE COURT: I -- I -- I understand all of that.

[53]MS. DRAVES: Okay.

And, so with respect to the evaluation, there is - nothing would've changed the outcome of Defendant's sentencing, and that would go then to the prejudice element.

Next, with respect to Defendant's third argument, his allocution. I think that the Court's questions to Ms. Hunter were very important. As I'd indicated in my brief, the law at the time the Defendant was sentenced allowed for the allocution, the procedure that was followed in this case. Mr.

Hills' affidavit that's been attached to the Defendant's brief indicates that he did argue on Defendant's behalf in Chambers. And, I think that Ms. Hunter is mistaken in -- in indicating that People v. Barry allows for a retroactive application of -- of violation of that procedure. The Defendant is held to the -- the state of the law at that time. And, People v. Kowalski (phonetic spelling) supports that proposition.

He did have a chance to address the Court during the formal sentence hearing.

And, both People v. Dumas (phonetic spelling) and People v. Matzat, M-A-T-Z-A-T, indicate that the proper cedure -- procedure was followed in this case.

Now, I -- I do concede that the general rule in Michigan is that appellate decisions are to be given full **[54]**retroactive application; however, those cases also indicate they add the -- the caveat, Unless limited retroactive activ-- activity is justified. And, I would argue that it is in this case.

In fact, in People v. Secton (phonetic spelling), it's a 458 Mich App 43, 1998 case, the Supreme Court specifically held that when a decision of this Court involves a rule which concerns the ascertainment of guilt or innocence retroactive application may be appropriate.

Conversely, a new rule of procedure adopted by this Court which does not affect the inter-- integrity of the fact-finding process should not be given proc-- or should not be given retroactive effect. And, I'd ask the Court to consider that, too.

Whether Defendant was given the chance to allocute, according to current state of the law, did not affect the fact-finding process or his guilt or innocence in this case.

He was not denied his right to allocution.

And, I think that his representations that Mr. Hills did not allocute on his behalf are refuted by the record.

I, too, am going to rest on my brief, with respect to the personal jurisdictional claim. I pointed out in the brief that it's not even a jurisdictional defect to begin with, that the plain

reading of the court rule does not [55]allow for release if a preliminary hearing isn't held. It only relowed -- allowed for release if grounds for detention were not found. Defendant cannot ask this Court to review that issue under the current MCR 5.935, Subsection A1, because it does read differently. It does require release if a prelim. is not held within allotted time, the old court rule did not.

And, also, as noted in the brief, even if it were a personal jurisdiction issue, which I do not believe it is, personal jurisdictional issues have been deemed as non-jurisdictional defects under 6.500, and they can be waived. And, as a result of -- as soon as Defendant entered his plea he waived any argument he had to - whether the ju- Juvenile Court lacked jurisdiction over him.

And, no prejudice was perpetrated against the Defendant, because a s the Judge indicated at that time, he was being held on another charge.

Finally, with respect to the Defendant's ineffective assistance claims, he has faulted Mr. Hills for failing to allocute, which, as I just indicated, his own affidavit, Mr. Hills' own affidavit, has indicated that he did argue on Defendant's behalf.

And, also, his failure to order a psychological evaluation, considering the fact that the evaluation [56]would've had no significance to the sentence counsel cannot be faulty for bringing that.

I also would point out too the fact that whether to allocute is -- is a matter of discretion, on behalf of the defense counsel, it's a ta-- the Court, in Huuhes, at 165 Mich App 4 -- 550 -- or I'm sorry -- 548, a 1987 case, has indicated that it's a tactical or strategic decision. And, considering that Mr. Hills did allocute for the Defendant in Chambers -

THE COURT: Ms. Draves, if you're just gonna read from your brief, I -- I've read it, as well. I can read it just as well as you can.

I'm really interested in -- in oral argument.

I meant we've been at this now for almost an hour-and-a-half, just in insights and edifications and responses.

MS. DRAVES: Weil, is there any questions that the Court would have. . .

THE COURT: No.

MS. DRAVES: (inaudible response)

THE COURT: I haven't asked any; . . .

MS. DRAVES: Okay.

THE COURT: . . . that would seem to imply I don't have any.

[57]MS. DRAVES: Well, I would ask that this Court deny Defendant's motion, based on the good cause prejudice alone, --

THE COURT: Okay.

MS. DRAVES: -- or good cause element alone.

THE COURT: Okay. Thank you.

Any response, Ms. Hunter?

MS. HUNTER: Brie-- brief, Your Honor.

THE COURT: Pardon me?

MS. HUNTER: Brief.

THE COURT: Okay.

MS. HUNTER: The cause and prejudice arguments placed in our brief, in the brief that I submitted, Your Honor, have been placed there in case this Court should somehow hold that my client does have to show cause and prejudice to excuse procedural . . . However, I would refer the Court to Appendix B, the Friedman (phonetic spelling) article, which explains the difficult concept of cause and prejudice. However, cause is found where someone has no full and fair appeal. That's cause. That's People v. Reed. And, that's what Ms. Draves cited.

Ms. Draves talked a lot about what he could've done, what he could've done on appeal. I submit to the Court, she does not know what it's like for the many, many, many inmates who go into the system and do not know any law, [58]and years later find out what could have been done. They

don't know unless someone tells them. They have no way to know.

Reed says that the purpose of post-judgment relief was to provide finality of judgment after one full and fair appeal. My client didn't know what to raise. And, if he doesn't know what to raise he can't exhaust anything. There can be no procedural default. That's Rogers v. Howes.

So, just because he's aware of a right to appeal does not mean he knows the substance of it; he does not, and he did not until years and years and years had gone by. And, that happens to so, so many prisoners. That's why we have so many late motions.

THE COURT: I think we have so many late motions because there's now a court rule that allows for so many late motions.

MS. HUNTER: I don't know, Your Honor. I have a lot of clients who say, My attorney never told me. I didn't know.

THE COURT: Yeah.

MS. HUNTER: I had to go to the law library, and I didn't know.

THE COURT: Many of those same clients' attorneys show up with letters showing that they were advised 5, 6, [59]10 years ago of the same rights they're raising now. But, that's neither here nor there.

MS. HUNTER: At any event, there is no requirement in the 6.500 procedure that the delay be explained by the Defendant. That is not his burden of going forward.

I would just add at the plea procedure my client did not know at that time that anything he said could be used -- could not be used against him, under the Rules of Evidence.

Also, the fact that the Parole Board would consider it '98 -- would consider Judge McCully's recommendation, the 1998 letter clarifies it. That letter is from Kay Ire (phonetic spelling), the Executive Secretary at the Parole Board.

Finally, I would just add, I heard Ms. Draves talking a lot about it, I have to show prejudice claiming here an invalid

sentence. And, under MCR 6.508D3b4 prejudice is presumed if we show the sentence is invalid. So, an invalid sentence is prejudice, in and -- inherently, in and of itself. We don't have to show prejudice beyond
that.

Moreover, under si-- MCR 6.4294 this Court has the power to correct an invalid sentence. And, the Defendant may also seek relief pursuant to the procedures set forth in MCR 6.500. No time limitations are mentioned there.

[60]The problem here really boils down to my client may as well have pled to first-degree murder.

And, finally, I would indicate to the Court, as to the retroactivity issue, allocution was never a new rule of procedure. It is a concept that is important to sentencing, and allocation -- allocution must be meaningful. And, we submit that Barrv is absolutely retroactive. It is not just a mere technical procedure. It goes far, far beyond that and has due process implications. .

Thank you, Your Honor.

THE COURT: Thank you.

This Court will take that matter under -- or take this -- this motion under advisement and will issue a written opinion in due course.

And, thank you very much.

MS. DRAVES: Thank you, Your Honor.

MS. HUNTER: Thank you, Your Honor.

(At 15:44:18 p.m., this proceeding concluded)

****

[61]CERTIFICATION BY
CERTIFIED ELECTRONIC RECORDER

STATE OF MICHIGAN)
)
COUNTY OF KALAMAZOO)

I certify that this transcript, consisting of 61 pages, has been prepared to the best of my ability, and is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Tuesday, December 7, 1999.

March 14, 2000
Date

s/ Dianne M. Sponseller
Dianne M. Spsonseller, CER 3908
The Legal Record, Inc.
P.O. Box 081791
Rochester, MI 48308-1791
(248) 652-2710

Court of Appeals, State of Michigan

ORDER

PEOPLE OF MI v BRENT EUGENE KOSTER

Joel P. Hoekstra
Presiding Judge

Docket No. 231772

Richard A. Bandstra

LC No. 72-003140-FC

Jane E. Markey
Judges

The motion for leave to file a brief in excess of the 50-page limitation is GRANTED. The appellant's brief that was received on December 27, 2000 is accepted for filing.

The Court orders that he delayed application for leave to appeal is DENIED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

The motions for peremptory reversal and to remand are DENIED as MOOT.

/s: Joel P. Hoekstra
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 07 2001
Date

/s: Sandra Schultz Mengel
Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

Entered: November 30, 2001

119541 & (24) (25)

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 119541
COA: 231772

BRENT EUGENE KOSTER, Kalamazoo CC: 72-003140-FC

Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal from the June 7, 2001 decision of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for peremptory reversal and the motion for remand to trial court are also considered, and they are DENIED.

pah:1127

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 30, 2001 /s: Corbin R. Davis, Clerk

Order

Michigan Supreme Court
Lansing, Michigan

Entered: March 4, 2002

119541 (35)

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 119541
COA: 231772

BRENT EUGENE KOSTER, Kalamazoo CC: 72-003140-FC

Defendant-Appellant.
_____/

On order of the Court, the motion for reconsideration of this Court's order of November 30, 2001, is considered, and it is DENIED because it does not appear that the order was entered erroneously.

Kmt:0226

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 4, 2002 /s: Corbin R. Davis, Clerk

CERTIFIED COPY OF RECORD OF SENTENCE
TO ANY PRISON - (On Plea of Guilty)

State of Michigan

The Circuit Court for the County of KALAMAZOO

At a session of the Circuit Court, continued and held at the Court House in the City of Kalamazoo in said County and State, on Monday the 21st day of July 1975.

Present, Honorable PATRICK H. MCCAULEY, Circuit Judge.

The People of the State of Michigan,
vs.

BRENT EUGENE KOSTER

Brent Eugene Koster, the Respondent in this cause, having upon his voluntary plea of guilty to the information filed against him in this Court, been duly convicted of the crime of MURDER, 2ND DEGREE and the Court, before pronouncing sentence upon such plea, being satisfied after such investigation as was deemed necessary for that purpose, respecting the nature of the case and the circumstances of such plea, that the same was made freely and with full knowledge of the nature of said accusation, and without any undue influence, and having been, on motion of the Prosecuting Attorney, brought to the bar of the Court for sentence, and having been there asked by the Court if he had anything to say why judgment should not be pronounced against him and alleging no reason to the contrary

Therefore, it is Ordered and Adjudged, by the said Court, now here, that the said BRENT EUGENE KOSTER, shall be forthwith committed to the STATE PRISON of

Southern Michigan in Jackson County for the purpose of classification and shall be confined in such Penal Institution as shall be duly designated, for a period of the rest of his natural life from and including this day.

The Court recommends no release on parole.

/s/ Patrick H. McCauley
Circuit Judge

[1] STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
COUNTY OF KALAMAZOO

THE PEOPLE OF THE STATE OF MICHIGAN

B 723 00 739 FY

v

B 723 00 140 FY

BRENT EUGENE KOSTER,

ARRAIGNMENT

DEFENDANT.

_____/

Proceedings had in the above-entitled cause, before Honorable Patrick H. Mc Cauley, Circuit Judge, on June 11, 1975, at Kalamazoo, Michigan.

APPEARANCES:

STEVEN M. WHEELER, Asst. Pros. Atty.
Appearing on behalf of the People

JAMES D. HILLS, ESQ.
Appearing on behalf of Defendant.

- - -

[2]Kalamazoo, Michigan
June 11, 1975

- - -

MR. WHEELER: May it please the Court, this is the matter of the People of the State of Michigan v Brent Eugene Koster. There are two file numbers which have been consolidated for purposes of trial. Under the new numbering it would be B 723 00 140 FY and B 723 00 139 FY. The cases were originally consolidated under the 139 number. At this time I think it is advisable that the Court separate these cases again, for purposes of trial .

THE COURT: They have been consolidated?

MR. HILLS: For purposes of trial.

THE COURT: I see no reason for separating them. We will keep them consolidated. They have been consolidated for trial.

Let's take the first case first, 723 00 139, which states that on the 6th day of July, in 1972, that you, Brent Eugene Koster, did murder Claudia Bidstrup. Is this the one he is going to plead to?

MR. HILLS: We would stand mute on that.

THE COURT: Contrary to Sec. 750.316 of the Compiled Laws of 1948, as amended. You still wish to stand mute on that case?

MR. HILLS: That is correct, your Honor.

THE COURT: The Court will again enter a plea of not [3]guilty on your behalf in that case.

The other case, being B 723 00 140.

First I will ask you - you are here, Mr. Hills. I should put on the record who is here. Mr . Wheeler is here from the prosecutor's office. Mr. Gregart, shall I put you on the record as being here?

MR. GREGART: Yes.

THE COURT: Mr. Hills, you are here representing Mr. Koster, and Mr. Brent Koster, you are here.

MR. HILLS: I am his retained counsel, your Honor.

THE COURT: You are Brent Eugene Koster?

DEFENDANT: Yes, sir.

THE COURT: Mr. Koster, it states in this information that on or about the 7th day of July, 1972, that you did murder Linda Clark, contrary to Section 750.316 of the Compiled Laws of 1948, as amended. Do you understand this is what we refer to as an open count of murder, commonly referred to as first degree murder?

DEFENDANT: Yes.

THE COURT: Do you understand the charge?

DEFENDANT: Yes.

THE COURT: What is your desire, gentlemen?

MR. HILLS: Your Honor, pursuant to an agreement between the Prosecutor's office and myself back in October of 1972, it was indicated that as part of the agreement my client **[4]**would tender a plea at this particular time to the charge of second degree murder in this particular case, your Honor. I have a copy of that. I believe Mr. Koster does also.

THE COURT: I will put it on the record at a later date. Let me go through it so we are clear.

Your name is Brent Koster?

DEFENDANT: Yes.

THE COURT: You are presently charged with first degree murder. Let me read the statute of what you are charged with. I will also then read the lesser included offense of second degree so I am sure you understand them.

First degree murder, under MSA 28.546, reads as follows:

"All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state

prison for life."

That is the original charge against you, Mr. Koster. You understand that there has to be premeditation?

DEFENDANT: Yes.

[5]THE COURT: Second degree murder, which your attorney indicates to me you wish to tender a plea to this Court of guilty, based upon plea negotiations, is as follows: (This is Section 28.549, second degree murder, Sec. 317.)

> "All other kinds of murder shall be murder in the second degree, and shall be punished by imprisonment in the state prison for life, or any tern of years, in the discretion of the court trying the same."

This is the lesser included offense your attorney has advised me you wish to tender a plea of guilty to, is that correct?

DEFENDANT : Yes.

THE COURT: Mr. Koster, before I can accept a plea of guilty, I have to go over all of your constitutional rights. I am sure your attorney has done this for you, he has gone over these with you. On the other hand, it is necessary that the Court personally does this, to be sure the attorney didn't miss anything, and to be sure you understand it.

First off, your name is Brent Koster, is that correct?

DEFENDANT: Yes.

THE COURT: You are charged originally with first degree murder, and now you are tendering a plea of second degree, and the elements of that offense are that Linda Clark was murdered by you, without premeditation. Do you understand those elements?

[6]DEFENDANT: Yes.

THE COURT: Do you understand if your plea is accepted you will not have no trial, you will not have a jury trial and you will not have a non-jury trial -- that you will get neither at trial by jury nor by the Court without a jury, do you understand that?

DEFENDANT: Yes.

THE COURT: Do you understand that you have a right to a lawyer to represent you during all proceedings? That includes trial, any sentence, and appeal, and the Court will appoint a lawyer for you if you cannot afford a lawyer?

DEFENDANT: Yes.

THE COURT: Do you know the maximum sentence, as indicated to you, can be state prison for life, or any term of years, in the discretion of the Court?

DEFENDANT: Yes.

THE COURT: Do you understand you could be sentenced to life in prison?

DEFENDANT: Yes.

THE COURT: If you are on probation or parole, and I accept this plea of guilty do you realize it could result in revocation of your probation or parole, and you would then probably be subject to the full penalties of such prior conviction, or could be?

DEFENDANT: Yes.

THE COURT: Are you on parole or probation?

[7]DEFENDANT: No --

THE COURT: You don't think so?

DEFENDANT: In my younger years, juvenile probation.

THE COURT: But it has terminated now?

DEFENDANT: Yes.

THE COURT: Are you satisfied with your lawyer?

DEFENDANT: Yes.

THE COURT: Has he fully explained your constitutional rights and the elements of this offense?

DEFENDANT: Yes.

THE COURT: Do you know that your lawyer will continue to represent you at public expense if you cannot afford to pay him, throughout these proceedings and through a trial if you want one?

DEFENDANT: Yes.

THE COURT: Now, if I accept your plea of guilty do you understand that you are waiving the following constitutional rights that you have? Mr . Koster, I am going to read each right to you. I want to see if you understand the right. If you don't understand it, stop me, and I will explain it to you in detail. Then if you wish to waive the right - I will ask if you wish to waive the right. If you waive the right we will then go through your constitutional rights one at a time.

First I will ask how old are you, Mr. Koster?

DEFENDANT: 18.

[8]THE COURT: What school did you go to? How far did you go in school?

DEFENDANT: To the tenth grade.

THE COURT: Tenth grade?

DEFENDANT: Yes.

THE COURT: How were your marks, pretty good?

DEFENDANT: No.

THE COURT: Can you read and write?

DEFENDANT: Yes.

THE COURT: Do you have any problems with reading and writing?

THE DEFENDANT: No.

THE COURT: You do understand english? You have no problem with what I am saying?

DEFENDANT: No.

THE COURT: Your constitutional rights are as follows:

(1) you have a right to a speedy trial, and you can have a trial with a jury or you can have a trial by a judge without a jury, and if I accept your plea of guilty you are waiving these rights, and you will get neither a trial by jury nor by the Court without a jury. Do you understand that right to a jury or non-jury trial?

DEFENDANT: Yes.

THE COURT: Do you understand if you tender this plea and I accept it you are waiving that right?

[9]DEFENDANT: Yes.

THE COURT: Do you wish to waive that right?

DEFENDANT: Yes.

THE COURT: (2) Do you understand that throughout any trial you are presumed innocent until and unless you are proven guilty beyond a reasonable doubt by competent evidence? Do you understand that constitutional right?

DEFENDANT: Yes.

THE COURT: Do you understand you have to be proven guilty by competent evidence of each and every element of the offense, as I explained the elements to you?

DEFENDANT: Yes.

THE COURT: Do you wish to waive that right?

DEFENDANT: Yes.

THE COURT: Do you understand that if you elect to stand trial you have a right to be confronted by all witnesses against you, and this Court will compel the attendance of any witness who can testify in your behalf, and your lawyer has the right to question all these witnesses? Do you understand that right?

DEFENDANT: Yes.

THE COURT: Do you wish to waive that right?

DEFENDANT: Yes.

THE COURT: Do you understand that if you are tried on this charge you have a right to remain silent, and you need not incriminate yourself, and you do not have to take [10]the witness stand in your own defense unless you desire to do so, and the prosecution cannot comment upon your failure to take the stand and testify? Do you understand that right?

DEFENDANT: Yes.

THE COURT: Do you wish to waive that right?

DEFENDANT: Yes.

THE COURT: Do you understand if you are tried on this charge you have an equal right to take the witness stand be sworn under oath, and testify and tell the jury and the Court your side of the case?

DEFENDANT: Yes.

THE COURT: Do you understand that right?

DEFENDANT: Yes.

THE COURT: Do you wish to waive that right?

DEFENDANT: Yes.

THE COURT: Do you understand that if you elect to stand trial and are convicted, or if this plea is accepted by the Court, you have the right to appeal that conviction and the sentence?

DEFENDANT: Yes.

THE COURT: Do you wish to waive that right?

DEFENDANT : Yes.

THE COURT: Do you understand, Mr. Koster, everything I have said to you up to this point?

DEFENDANT: Yes.

[11]THE COURT: Do you have any questions?

DEFENDANT: No.

THE COURT: You understand everything I have said to you?

DEFENDANT: Yes.

THE COURT: No questions. Do you still wish to tender a plea of guilty?

DEFENDANT: Yes.

MR. HILLS: Maybe I was not listening. Did you indicate that if he did not testify you would have to instruct the jury as to his innocence -- no inference of guilt?

THE COURT: I didn't go into that detail, but I think I will.

What your attorney is suggesting is do you understand that you have a right to remain silent and need not incriminate yourself, and you do not have to take the witness stand in your own defense unless you desire to do so, and that the prosecution cannot comment upon your failure to do so? No inference adverse to you may be drawn if you choose not to testify, and this Court, at the request of your counsel, which he will request, would have to give the jury an instruction and instruct them that they can make no adverse inferences from

the fact that you did not testify; that you are presumed innocent until and unless you are proven guilty beyond a reasonable doubt by competent evidence, and they can make no [12]inferences from the fact that you did not take the witness stand. Do you understand that?

DEFENDANT: Yes.

THE COURT: Do you wish to waive that right?

DEFENDANT: Yes.

THE COURT: Has anyone promised you that you would be treated more leniently if you plead guilty than if you stood trial?

DEFENDANT: Yes, as far as the plea negotiations.

THE COURT: Well, let's explore that and see what you mean they told you. Do you understand if I accept this plea of guilty the Judge has to sentence you, and nobody else can?

DEFENDANT: Yes.

THE COURT: Did anybody tell you if you plead guilty and you didn't stand trial that the Judge would be more lenient, he wouldn't give you as stiff a sentence as if you stood trial?

DEFENDANT: There was no discussion as far as time limit. It was just the specific charge.

THE COURT: In other words, are you referring to the fact that in the plea bargain (that is coming up later and that I will put on the record later) that they didn't promise you that you would be treated more leniently if you plead guilty, but they did say you could tender a plea of guilty to [13]the lesser included offense of second degree rather than standing trial on first degree, is that what you mean by that?

DEFENDANT: Yes.

THE COURT: Is that it?

MR. HILLS: Yes, your Honor, I think he is referring to the fact that there was no discussion and no promises relative to sentence, just to the charge. We never discussed sentence, and I think that is what he is referring to.

THE COURT: Do you understand that, Mr. Koster?

DEFENDANT: Yes.

THE COURT: I want it very clear on the record that the prosecuting attorney and your attorney, Mr. Hills, neither of those can plea bargain the sentence. That is exclusively the right of the Judge. They could tell you anything they want about the sentence, and I am not bound by anything they say as far as sentence is concerned. If they have made an understanding or plea bargain with you, Mr. Koster, as to other charges, recommending that the Court accept a second degree plea rather than going to trial on first degree murder, that is part of the plea bargain. The prosecutor and your attorney may agree to those things. They may not agree to any sentencing. That is exclusively my prerogative as the Judge. Do you understand that?

DEFENDANT: Yes.

THE COURT: When I ask you has anyone promised you **[14]**you would be treated more leniently if you plead guilty than if you stood trial do you understand there is no agreement that you will be treated more leniently?

DEFENDANT: No agreement.

THE COURT: In other words I am the only man in this case handling the case now?

DEFENDANT: Yes.

THE COURT: The Judge is the only person that can pronounce sentence, and I tell you now I make no agreement with you as to leniency.

DEFENDANT: Yes.

THE COURT: Okay. Do you understand there are no agreements as to leniency if you stand trial or plead guilty you will be treated, as far as I am concerned, equally. Wether you stand trial or whether you plead makes no difference to me as far as sentencing is concerned. Do you understand that?

DEFENDANT: Yes.

THE COURT: Has anyone tried to force you to plead guilty, Mr. Koster?

DEFENDANT: No.

THE COURT: Have they threatened you with anything?

DEFENDANT: No.

THE COURT: Did they tell you they would lock you up forever if you didn't plead guilty, anything of that nature?

[15]DEFENDANT: No.

THE COURT: Are you, in fact, pleading guilty because you are, in fact, guilty of the charge?

DEFENDANT: Yes, I am.

THE COURT: In your own words, Mr. Koster, what did you do, what happened, as between you and -- I believe it is Linda Clark?

DEFENDANT: The over-all aspect of the case from beginning to end?

THE COURT: I don't need the details. What I need, Mr. Koster, is you are tendering a plea to second degree murder. The elements of that are that one Linda Clark was a live young lady at one time, and you say that you did murder, that is that you killed Linda Clark. They originally said you did it with premeditation, that you sat down and plotted it, planned it, and coldly murdered her. You are now saying, under second degree murder, that you killed her but you did not do it with premeditation, you didn't sit down and it all out, and then go out and carry your plan in to effect and kill her , but you are saying that you did, in fact, murder one Linda Clark, a young lady of this community?

DEFENDANT: Yes.

THE COURT: What did you actually do.

DEFENDANT: Murdered her.

THE COURT: I have to have the facts, Mr. Koster. You [16]don't have to go into all of the details. I have to know where you met the girl, what you did with the girl, how did you kill her, if you killed her.

DEFENDANT: Met her at the Sprinkle Road Standard Station.

THE COURT: Slow down. She has to write it down.

DEFENDANT: When she came in to get some gas me and an accomplice abducted her. She was raped and killed, and then placed in a place near Galesburg.

THE COURT: As I understand it, Mr . Koster, this young lady came into the service station - - were you working at the station?

DEFENDANT: Helping. I wasn't legally working, no.

THE COURT: You were hanging around, helping the other person who worked there?

DEFENDANT: Yes.

THE COURT: And what did you do? Did you take her into the gas station, or did you take her into a car or into the woods? Where did you take her when you raped her?

DEFENDANT: Well, the place actually where it took place was in the van.

THE COURT: In what kind of a van?

DEFENDANT: A Chevy Corvair van.

THE COURT: You put Linda Clark in the van, you and an accomplice?

[17]DEFENDANT: Yes.

THE COURT: You then raped her. Did you rape her or the accomplice or both?

DEFENDANT: Both.

THE COURT: Both of you did, and then you took her into the woods or did you kill her in the van?

DEFENDANT: Killed her in her own car.

THE COURT: In her own car. How do we get from the van to her own car?

DEFENDANT: Walking. It was a very short distance.

THE COURT: Was this all at the station?

DEFENDANT: Yes.

THE COURT: You took her out of the van, put her in her own car. How was she killed?

DEFENDANT: Strangulation.

THE COURT: Who put the -- was it hand choking, rope, or wire?

DEFENDANT: Rope.

THE COURT: Who put the rope around her neck?

DEFENDANT: I did.

THE COURT: You did?

DEFENDANT: Yes.

THE COURT: Who tightened it so that she strangled?

DEFENDANT: I did.

THE COURT: You did. Was the accomplice with you?

[18]DEFENDANT: He was in the vicinity, not actually right next to me.

THE COURT: Did you actually pull the, hold the rope long enough that you saw she was dead?

DEFENDANT: Yes.

THE COURT: She quit moving, quit struggling?

DEFENDANT: Yes.

THE COURT: Quit breathing?

DEFENDANT: Yes, sir.

THE COURT: About how long is your best opinion ~~did~~ you hold the rope so that it would strangulate her?

DEFENDANT: Three, four minutes.

THE COURT: Three or four minutes. And you were satisfied in your mind she was dead, and that was it?

DEFENDANT: Yes.

THE COURT: Then you didn't leave her in the car, you went out to Galesburg, the woods?

DEFENDANT: We left her in the car and drove her car out to Galesburg.

THE COURT: And left her in the car, in her car out in the woods. Did the accomplice follow you in the van and drive you back?

DEFENDANT: No.

THE COURT: How did you get back?

DEFENDANT: Walked; hitch-hiked.

[19]THE COURT: You drove her in the woods, left her body in the car, in the woods, and you walked back to Galesburg?

DEFENDANT: Walked back to Kalamazoo.

THE COURT: That was on the 6th of July, 1972?

DEFENDANT: On or about. I'm not sure.

MR. HILLS: Your Honor, he has indicated to me -- you can ask him -- when he took the body out there he tried to set the body in the car on fire. That didn't work.

MR. GREGART: That it occurred in the County of Kalamazoo.

THE COURT: That was all in the County of Kalamazoo, you know that?

DEFENDANT: Yes.

THE COURT: Where is the service station?

DEFENDANT: On the corner of Easy Street and Sprinkle Road.

THE COURT: East --

DEFENDANT: Easy Street and --

THE COURT: E-Z-E-E?

DEFENDANT: Easy.

MR. HILLS: By I 94 and Spinkle.

THE COURT: That is in the County of Kalamazoo.

DEFENDANT: Yes.

THE COURT: I am satisfied that defendant's plea is freely, understandingly, and voluntarily made, without [20]compulsion or duress. I am also satisfied that the crime was committed and that the defendant in fact committed it.

The next question I have, is this tendered plea the result of an agreement between the prosecutor and the defendant, and if so, I want the prosecutor and the defense attorney to put it on the record, whatever any agreements may have been, and I want to see if Mr. Koster has agreed to these agreements, if there are any.

MR. HILLS: That is correct, your Honor. I am retained. I was retained from the outset on this case, even though it was three years ago. I met with the prosecutor, who is still the prosecutor, Donald A. Burge, and with the Captain of Detectives, Neil Anderson, of the Kalamazoo County Sheriff's

Department. These negotiations took place in this building, in the prosecutor's office, and during part of those negotiations my client , Brent Koster was present. Those negotiations took some time. They were subsequently written down in letter form.

Two letters were written to me, October 16 and October 17, 1972, addressed to me. They have been signed by Prosecutor Burge and Captain of Detectives Neil Anderson. I have gone over those with my client, and if the Court wishes, I would read those letters a this time.

THE COURT: I would like the letters read into the record.

[21]MR. HILLS: The first letter is dated October 16, 1972, and it is on the letterhead of the Office of the Prosecuting Attorney, County of Kalamazoo, County Building, Kalamazoo, Michigan and addressed to Mr. James D. Hills, Attorney at Law, 232 West Michigan Avenue, Kalamazoo, Michigan 49006, Re: Brent Koster, First Degree Murder, File No. CR 723-139B

First Degree Murder, File No. CR 723-140B, reading:

"Dear Mr . Hills:

"This is to confirm our recent conversation concerning your client and our discussions involving plea negotiations. In our discussions, you have indicated your client's willingness to testify as a witness for the People of the State of Michigan provided our office would accept a tendering of a plea of guilty to the charge of Second Degree Murder in one of the two (2) above-captioned cases.

"In our numerous and lengthy plea negotiation discussions involving this case, this office discussed not only the two (2) captioned cases but also additional murders within this county which are, as of this date, unsolved, i.e., no arrests have been made. The discussions involved evidence which our office has

which leads us to believe that Danny Arthur Ranes may be involved in the murder of Patricia Howk. The discussions also involved our understanding of the involvement of Danny [22]Arthur Ranes in the missing persons case involving Pamela Fearnow. It is our further understanding that your client may have information regarding the Howk and Fearnow cases and that if he does, he will truthfully relate such information to applicable law enforcement authorities.

"Inasmuch as your client has indicated his willingness to tender a plea of guilty to murder in the second degree to one (1) of the two (2) captioned cases, this office is willing to accept the tender of such plea conditioned upon certain provisos as follow.

"This office will not oppose the tendering of such plea of guilty to second degree murder provided your client will give truthful statements to applicable law enforcement authorities regarding his knowledge about all crimes, including, but not limited to, the four (4) aforementioned offenses, to-wit: CR 723-139B, CR 723-1401 Patricia Howk and Pamela Fearnow. In addition, your client must agree to submit himself to any and all polygraph (lie detector) examinations requested by this office and law enforcement agencies for the purpose of insuring the truthfulness of the statements given by your client. Further, your client must agree to testify against any and all persons charged with crimes of which your client has knowledge and must so truthfully testify. With [23]respect to such testimony, your client must agree to submit himself to any and all polygraph examinations requested by this office or law enforcement agencies prior to such testimony so that our office may be assured of the truthfulness of such testimony.

"You have indicated that it is your intention to appeal the defendant's waiver from Juvenile Court. Inasmuch as this office will not and should not enter into plea negotiations involving a defendant's right to appeal, this agreement involving plea negotiations in no way affects your right of appeal or our right to oppose such an appeal based upon the law and facts involved.

"This office, in addition, would be willing to join with you and request a stay of proceedings in the trial court pending the appellate processing of this matter. In the event the People prevail in this appeal, it is understood that your client at that time will tender his plea of guilty to second degree murder at a time to be fixed by this office.

"'Very truly yours,

There is the signature of Donald A. Burge, Prosecuting Attorney, and it is signed by Neil Anderson, Captain of Detectives, Kalamazoo County Sheriff's Department, witnessing. That completes the first letter.

[24]There is another letter on the letterhead of the Office of the Prosecuting Attorney of the County of Kalamazoo, Kalamazoo County Building, Kalamazoo, Michigan, addressed to Mr. James D. Hills, Attorney at Law, 232 West Michigan Avenue, Kalamazoo, Michigan 49006; Re: Brent Koster, First Degree Murder, File No. CR 723-139B; First Degree Murder, File No, CR 723-140B.

"Dear Mr. Hills:

"This is to supplement my letter of October 16, 1972, involving the captioned matter. In our discussions you have asked what position this office would take with respect to other crimes which your

client may disclose to law enforcement officials.

"This is to advise you that upon the court's acceptance of the tendered or offered plea to murder in the second degree in one of the captioned cases this office will move to dismiss any and all charges pending other that that which your client pleads guilty to.

"Further, this office will not charge your client with any other crimes which your client may disclose in the course of the interrogations.

"I trust this answers your inquiry.

"Very truly yours,

There is the signature of Donald A. Burge, Prosecuting Attorney and witnessed by Neil Anderson, Captain of Detectives, Kalamazoo County Sheriff's Department.

[25]THE COURT: Do we have copies of those letters?

MR. WHEELER: Yes, we will provide you with copies.

THE COURT: Is it agreeable to you, Mr. Hills, that we have copies put in the file as part of the file?

MR. HILLS: I so agree, your Honor.

THE COURT: Mr. Wheeler, I believe you are handling the case. You have heard the agreement between Donald Burge and Mr. Hills in the letters. Was that the understanding you have as the agreement by the prosecuting attorney's office?

MR. WHEELER: Yes, your Honor, that is a full and complete statement of the entire agreement. In addition, two things should be stated.

In reference to the appeals, the defendant has appealed to the Michigan Court of Appeals. That appeal was decided adversely to the defendant. The matter is now presently

pending before the Michigan Supreme Court. As stated in the plea agreement, we make no agreements as to that appeal. We reserve the right to challenge the appeal. And as to the dismissal of cases, we will move to dismiss those cases a time of sentencing.

THE COURT: I note, Mr. Gregart, you are here. I believe Mr. Burge is unavailable this week. I believe he is ill. You are the acting prosecuting attorney. Is that your understanding?

MR. GREGART: With the provisos Mr. Wheeler indicated, [26]yes, your Honor, that is the agreement. We will dismiss the other pending charge against Mr. Koster at time of sentence, and he has appealed to the Court of Appeals, and the result was as indicated by Mr. Wheeler.

THE COURT: Mr. Koster, you have heard your attorney read on the record the total agreement between yourself, your attorney, and the prosecuting attorney's office?

DEFENDANT: Yes.

THE COURT: Did you notice in there there wasn't one mention of anything concerning sentence?

DEFENDANT: Other than second degree.

TEE COURT: Nothing. Did you notice there is nothing in there saying, "We will recommend a sentence of this or that, or anything?

DEFENDANT: No.

THE COURT: There is no mention of sentencing?

DEFENDANT: No.

THE COURT: You understand that?

DEFENDANT: Yes.

THE COURT: I further note, so that we get it clear, that any agreement here does not go to the sentence. Do you understand that?

DEFENDANT: Yes.

THE COURT: Secondly, they did mention in the letter, and Mr. Wheeler did mention that you appealed some matter in [27]the proceedings to the Appellate Court. They held

adversely to you, and Mr. Hills now has that pending before the Supreme Court. I believe that issue, Mr. Hills, without being involved in it, was in essence something as to the waiver of Mr. Koster from the Probate Court to the Circuit Court, is that correct?

MR. HILLS: That is correct. It is still pending in the Michigan Supreme Court.

THE COURT: Do you understand that is still pending, that issue?

DEFENDANT: Yes.

THE COURT: Now, so we don't have any confusion, you also understand if I accept your plea of guilty to second degree murder you also have a right, as a matter of right, to appeal that plea of guilty and sentence to the Appellate Court if you are not happy, do you understand that, or if you wish to appeal that, and that is separate from this appeal we are talking about. Do you understand your right there?

DEFENDANT: Yes.

THE COURT: One further thing I have to tell you, Mr. Koster, and be sure you understand it. The prosecuting attorney and your attorney, Mr. Hills, have made this agreement they put on the record. Basically, and not being all-inclusive but summarizing, if the Court accepts your tendered plea of guilty to second degree murder of Linda Clark, they will move to dismiss the charge of first degree murder, I believe of Linda Clark, the first degree murder charge of one Claudia Bistrup, [28]and any and all other charges. I assume the Patricia Howk and Pamela Fearnow cases they would not charge you with. Do you understand all those agreements?

DEFENDANT: Yes.

THE COURT: Do you understand if I accept your plea of guilty at this stage of the proceedings the prosecuting attorney is bound by that agreement, your attorney is bound by that agreement, this Court is bound by the agreement – if I accept your plea of guilty to second degree? Do you understand that?

DEFENDANT: Yes.

THE COURT: The nice thing is you are not bound by it right now today. You can say, "I don't want to live-up to that agreement. Even though I testified, I have done my part of the agreement. Today I don't want to live up to the rest of it. I want a trial on these cases." Do you understand that?

DEFENDANT: Yes.

THE COURT: You have a perfect right to say, "I don't want anything to do with that agreement, I reneg; I quit; I don't want to live up to that agreement. I want a trial." If you say that I will grant you the trial. Do you understand that?

DEFENDANT: Yes.

THE COURT: Knowing that do you wish to waive your right to trial by jury or a judge trial and ask me to take a plea of guilty to second degree and live up to the terms of the [29]agreement?

DEFENDANT: Yes.

THE COURT: With that I will accept your plea of guilty to second degree murder of Linda Clark, Case No. B 723 00 140B.

I will ask either the prosecutor or the defense attorney, is there anything you can think of that the Court may have forgotten to cover in this matter?

MR. WHEELER: May it please the Court, I know we talked all around it. I am not sure we asked specifically whether defense counsel and defendant understand those are the full terms of the agreement or have anything to add.

THE COURT: Do you both understand the full terms of the agreement have been read into the record?

MR. HILLS: I understand that.

THE COURT: Do you agree to it?

MR. HILLS (sic): I agree those are the full terms. I would add I represented Mr. Koster for three years, that his tendered plea today is voluntary, with no threats or coercion on anyone's part.

THE COURT: Do you understand that and do you

accept it?

DEFENDANT: I do.

THE COURT: I don't believe I can think of anything I have forgotten, Mr. Koster. Before I set a sentencing date, I have now accepted your tendered plea of guilty of second degree murder of Linda Clark. I don't want to go into this [30]at time of sentence. I will give you a chance to say anything you want concerning this at this time as to your tendered plea and acceptance of the plea. Is there anything you would like to tell the Court that you may have forgotten or over-looked?

DEFENDANT: Not that I can think of, no.

THE COURT: No. In that case, Mr. Koster, I will set sentencing. Will the Probation Department have time by July 21, do you think, or will they need more time, Mr. Wheeler?

MR. WHEELER: I believe they will, your Honor.

THE COURT: I will set sentencing for July 21 at 9:30. I think the record should show, Mr. Koster, you have also been in the county jail since 1972, is that correct?

DEFENDANT: Beginning of 1973.

THE COURT: '73. Is there anything in that experience that may have affected your plea this morning?

DEFENDANT: No.

MR. WHEELER: Your Honor, might we put on the record that that stay of proceedings was voluntary on both parts? That is the reason for the delay.

THE COURT: Let the record show you have been in jail all of this time, and that was a mutual agreement between yourself, your attorney, and the prosecuting attorney, that you wanted this. It was your desire to remain in the county jail pending the appeal of your case that is up before the Supreme Court. [31]That is, your appeal to the Appellate Court. That was your desire?

DEFENDANT: Yes.

MR. HILLS: That is correct. I have talked with Mr. Koster on many occasions relative to possibly pleading guilty

to second degree murder, but he continually asked the stay be in effect pending the appeals, and I believe it was my understanding, and I think that is what he indicates too.

THE COURT: There is no bond. I am not going to set bond. Between now and July 21 is a short time compared to the time you have already been in the county jail, so I will commit you back to the county jail until sentencing.

We will have the Probation Department out to interview you, and they will give me a fill written report to assist me in sentencing.

MR. HILLS: Thank you, your Honor.

MR. WHEELER: Thank you, your Honor.

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I hereby certify that the foregoing is the full, true, and correct transcript of the proceedings had at the arraignment of the defendant in the above matter, at the time and place in the caption hereof set forth.

/s: NO SIGNATURE
CIRCUIT JUDGE

[1] MICHIGAN DEPARTMENT OF CORRECTIONS
BUREAU OF PROBATION

PRE-SENTENCE INVESTIGATION REPORT

Date: 7-17-75

To The Hon. Patrick H. McCauley Docket No. Cr723-140B

Circuit Court Of:
Kalamazoo County By: Girts Berzins, Probation Agent

NAME KOSTER, Brent Eugene
OFFENSE MURDER, 2nd Degree

MAX : LIFE
MSA : 28.548 CL: 750.316

Your Honor:

This 18-year old, single, white male entered a plea of guilty to a reduced offense of 2nd Degree Murder on June 11, 1975. The defendant was arrested on September 3, 1972, when the defendant was a juvenile and the defendant has been held in the Kalamazoo County Jail since the day of his arrest. If sentenced on July 21, 1975, the defendant should be credited with 1,051 days already served while awaiting disposition of his case.

This defendant, following plea negotiations through his attorney, agreed to plead guilty to 2nd Degree Murder of a specific count charged of killing Linda Clark. In return, the defendant, through his attorney, agreed to testify against the co-defendant, Danny Ranes in four different cases of murder while perpetrating a rape.

In early July of 1972, through extensive police investigation,

Kalamazoo County Sheriff's Department detectives arrested a juvenile, Brent Eugene Koster, and charged this Juvenile with the murders of Claudia Bidstrup and Linda Clark, two nineteen year old girls from Chicago, Illinois, whose dead and decomposed bodies were found near Galesburg, Michigan. Through the Sheriff's Department investigation, with the help of numerous other law enforcement agencies, they were able to piece together the following events.

On Wednesday night, July 5, 1972, Danny Arthur Ranes was at his place of employment at the Standard Station on Sprinkle Road near the intersection of I-94. Shortly before midnight, Brent Eugene Koster went to the station to help Danny Ranes. At approximately 1:00 a. m. on July 6, 1972, two girls drove in to the station in a 1969 blue, two door, Opel Cadette. The driver asked for the gas tank to be filled and the defendant, Brent Eugene Koster, began putting gas in the tank. At this point Danny Ranes raised the hood as if he was checking the engine and pulled off a spark plug wire. While the car was being serviced the girls were in the station using a telephone and attempting to call someone in Ann Arbor, Michigan. However, they did not get through. The girls then got back into the car and the defendant and Danny Ranes waited t o see what the affect on the girls would be as to whether they would notice that the car was not running properly. The defendant, Brent Koster indicated that Linda Clark started the car and did notice that it was not running right. At this point, Ranes told her to pull the car into the first bay of the station and he would check to see what was wrong.

[2]The girls drove into the first bay at which point Koster lowered the overhead door. Danny Ranes then opened the hood and put the spark plug back on and talked to Linda Clark for several minutes about the auto's mechanics. The girls then got back into the car and as they were about to leave Ranes was standing by the driver's door where Linda Clark

was seated. He pulled a knife from his belt and at this point the defendant, Koster, also pulled a knife. They ordered the two girls into the back seat of the Opel and Danny Ranes and the defendant, Brent Koster, got in and drove the car around to the rear of the gas station. At this point, they tied the girls' hands behind their backs with some white cord which Ranes had furnished and bought previously. The defendant, Koster, indicated that the two of them had talked several times about getting a girl into the station and raping and killing her. The present action apparently appears to be an end result of their discussions.

Danny Ranes, at this point, told the defendant to go watch the station and come back to the car in about thirty minutes. The defendant indicated that when here turned to the car Danny Ranes was sitting in the front seat reaching over the back and playing with Linda Clark's private parts. The defendant then got into the car and Danny Ranes went to watch the station. The defendant talked to the girls, gave them a cigarette and in a few moments Ranes returned. Ranes then went through the girls' purses finding about sixty dollars and at this point the men then put both girls inside of Ranes' blue Corvair van which was parked at the rear of the station. Danny Ranes again told the defendant to watch the station which he did for about a half an hour. When the defendant returned to the van he opened the door and noticed that Ranes was engaging in sexual relations with Linda Clark. A few moments later Ranes went to watch the station and the defendant stated that he got into the van and also had sexual relations with Linda. At that point Ranes drove up to the rear of the van in his girl friend's 1968 Chevrolet which was a prearranged signal that time has come for the defendant to start getting the girls dressed. The defendant dressed them and Ranes and the defendant put Linda in the back of the Chevrolet. Claudia was placed in the Opel Cadette and at this time the defendant, Koster, took some of the white cord, put it around Claudia's neck and started to

strangle her. Danny Ranes returned to the automobile and noticed that Claudia was not dead so Ranes took hold of one end of the cord while Koster had the other and they pulled the cord tight until Claudia Bidstrup was dead. The defendant then went to the Chevrolet and got in the back seat with Linda Clark. The defendant placed a cord around her neck and strangled her to death. The men then put both girls into the back seat of the Opel Cadette and covered them with the blanket. The blanket came from Ranes' van and Danny Ranes proceeded to close the gas station and return to the victim's car with a gallon of gasoline in a plastic container. The defendant drove the Opel Cadette out near Galesburg to a wooded area at which point they poured gasoline over the blanket and throughout the girl's car. They then proceeded to put a lit cigarette inside a package of paper matches placing them on the floor of the car at the driver's side with the hope that the cigarette would ignite the matches and subsequently the matches would ignite the gasoline and completely destroy the car and the victims' bodies. The car did not burn and the murder victims were discovered [3]considerably later by a person riding a motorcycle in the area who notified the Kalamazoo County Sheriff's Department which resulted in intensive investigation and subsequent arrest of the defendant and his accomplice, Danny Ranes.

The defendant frankly admitted to this agent participation in the murder of three young girls. The last murder occurred when on August 5, 1972, at approximately 1:30 p.m. Danny Ranes and the defendant, Brent Koster, were driving Ranes' van-type truck in the area of Western Michigan University. They were driving out West Michigan Avenue when they observed a girl hitchhiking. The girl, who was later identified as Pamela Fearnow was picked up by the pair and she indicated that she wanted a ride to the West Main Mall. Ranes then proceeded to drive out West Michigan Avenue to Drake Road turning north and traveling to West Main Mall area.

Near the mall Ranes stopped the van and as Pamela Fearnow started to get out he let the clutch out quickly causing the van to jerk and Pamela lost her balance. Pamela sat down on the motorcovering, Ranes proceeded to drive a short distance then stopped the van, pulled out a knife and told Pamela, "Don't scream and you won't get hurt ". At this point, the defendant, Brent Koster, climbed into the back of the van and tied Pamela's hands behind her back. Koster placed her on the sponge rubber mattress that was in the van and covered her with a sleeping bag. Ranes drove the van to a wooded area near Comstock and there both Ranes and Koster untied the girl's hands and took her clothing off which consisted of a blue pullover top, blue jeans, underpants, but no bra. Koster indicated that he and Ranes both had sexual intercourse with Pamela Fearnow. After the first rape, the defendant and Ranes both kept the girl prisoner for the rest of the afternoon. They moved the van three or four more times during the day to different wooded locations where each of them continued to have intercourse with Pamela during the afternoon. As darkness approached, Ranes and the defendant instructed Pamela to dress herself. After she had dressed they tied her hands behind her back and also tied her feet. At this point, the defendant took some grease rags and forced them into her mouth as gags. Koster then put a green plastic garbage bag over her head and tied a cord around the bag and her neck in order to shut out any air. By this time Ranes had driven to another area in the vicinity of Comstock and removed Pamela's body from the van leaving her in this secluded area. As the defendant and Ranes started to walk back to the van, they observed a police car pull into the area. At this point, the defendant, Brent Koster ran back into the woods and made his way to M-96. Ranes was checked out by a sheriff's officer. The officer observed that Ranes had a hard on but found no one else in the vicinity. Later that night the defendant, Brent Koster, called Danny Ranes at his girlfriend's trailer and Ranes came and picked the defendant up at the Griffith Dairy on M-

96 in Comstock Township. Early the next morning Ranes and [4]Koster returned to the wooded area in Comstock where they had left Pamela Fearnow's body. The defendant indicated that he and Ranes picked up the body, placed it in the van, and drove to another area. At that time they also removed the bag from her head and cut the cords from her hands and feet. These items were disposed of by Ranes.

It was basically the defendant's cooperation and testimony which has helped convict Danny Ranes of the murders of Mrs. Patricia Howk, Pamela Fearnow, Linda Clark and Claudia Bidstrip. In all four cases Danny Ranes was sentenced to the State Prison for the rest of his natural life. It might be pointed out, for the benefit of the prison officials, that Ranes made attempts to obtain a hit man to kill the co-defendant whose testimony helped convict Ranes in all these cases. The two individuals should not be placed in the same institution.

At the time of the defendant's arrest, the defendant was a juvenile and consequently the prosecuting attorney for the County of Kalamazoo petitioned the Probate Court on September 13, 1972, requesting waiver of jurisdiction of this case to the general criminal court jurisdiction for trial. A hearing was held in the Kalamazoo County Probate Court and on the 26th of September 1972, the Honorable Ivan M. Wheeler, Judge of Probate ordered that jurisdiction of said child and of said cause be and is hereby waived to the Circuit Court for the County of Kalamazoo in order that said child may be prosecuted under the general criminal statutes of this state. During the waiver of jurisdiction hearing, the Honorable Ivan Wheeler made the following reference towards the defendant's criminal and family background. "With Brent Koster we had a very long history. I say very long I mean maybe a very extensive record with many offenses. The length of it hasn't been so terribly long. The first petition for Brent in this matter occurred in June of 1970 in which there was a

charge for the theft of seventeen automobiles and in the official hearing on that which was held on August 25, 1970, this court, in his memorandum stated, 'This boy comes before the court for hearing on a petition that he stole an automobile. He has stole a tape recorder and many items from a car and he stole several other cars. As a matter of fact he admits the guilt of stealing the automobile and was actually apprehended and picked up in the theft of a car by Robert Nunnery from his mother and the boy was driving without a license and he admitted driving at least seventeen cars without a license and also stolen and participated in the theft of seventeen cars. He is perfectly truthful and seemed to be quite frank and honest about telling about what he had done in violation of the law. It's not certain that this boy really knows the consequences of his acts and the court did try to impress upon him the nature of the offenses'.

Following that proceeding, the boy was on probation. It did come back to the court on official hearing on November 12, 1971 and the "Court finds that the matter comes to the court on a petition for rehearing for violation of probation for stealing an automobile". At that time [5]the Court was convinced he should have foster care placement and this courts so ordered it. The court might mention that at that particular hearing this boy and the other boy chased around the countryside after the officer discovered them in a stolen car, purely because they did not want to get caught. Both boys had been in foster care homes; both boys had been returned to their own homes and this boy probably is the one that really set it up to steal this car but both boys really wanted to do it and the other boy was driving the car when apprehended at a high rate of speed through the countryside endangering the lives of all persons on the highway. Fortunately, they did not have an accident. There were no other cars on the highway at the time because their speeds according to police exceeded 115 miles per hour and this boy did not dispute it.

The court was going to return this boy to foster care. A relative interceded and asked for a chance to work with this boy. The court continued him on probation and he was on probation at the time a rehearing was scheduled in this matter for a hearing in this court on a petition. There having been a preliminary hearing on August 21, 1972, before Allen Smith, Intake Referee in which a petition was authorized to be filed for hearing before this court in which the charge was Receiving or Being in Possession of Stolen Property, to wit : a pistol. The matter on that petition has not been brought for hearing. Another preliminary hearing was held after that one was held on the question before the court today on the charge of Murder.

Under the circumstances, the court in hearing the testimony of witnesses in this case even has to be appraised of the fact that this boy is not in the placement of this court's custody. He has been in several other different homes. He has lived in a manner which this court have to find is the experience of a person many years of age older than he and seems to be able to pass for a person older than he. He has not had controls, apparently. He has not been under parents' guidance or custodian guidance for some little time. He apparently comes and goes as he pleases and, under the past history of this Court, the Court would have to find that under Criteria (1), that his pattern of living is such that we would not be able to effect a rehabilitation in the Juvenile Court. The prior records are considered by this Court to be numerous and, certainly, law violation of a serious nature. The boy is shown to this Court to be of large size, of good physical and mental maturity and, as the Court has indicated, his pattern of living would put him into an experience and sophistication that he's beyond his years. Maturity-wise, the Court makes no judgment on that, except that the acts he was doing are not kiddy, not things that you would expect a child to do and we had prior attempted, by probation and other means, to correct." Judge Wheeler

concluded that it is in the best interest of the public welfare and for the protection of public security that the defendant, Brent Eugene Koster, be required to stand trial as an adult offender on the criminal charges of First Degree Murder.

[6]During an interview with this agent at the Kalamazoo County Jail on July 15, 1975, the defendant was very cooperative, verified his criminal involvements in the past but was a little reluctant of repeating all the details as to his involvement in all three murders. The defendant made the following comments concerning his reluctance:

> "Why the hell we have to go through this again. I've been through hundred times. I get sick of it. You know I am guilty of this. I am getting sick of it. The crime was committed, everyone tried to make me a hard nosed sadist murderer. I can't hang on it."

This agent noticed that the defendant had unusual scars on his left arm and the defendant responded with the following comments to this agent's questions:

> "That is my suicide bit. It was with a razor blade. I was fed up with the jail. Personally, as far as the cutting and slicing goes I couldn't go through with it. It was two different incidents. I couldn't go through. I don't know. I just broke out in cold sweat. I said hell with it I'll just do my time."

In this agent's opinion, the defendant was quite disturbed that some people in the jail had referred to the defendant as a sadist. The defendant had a fairly good understanding of what that term meant and the defendant did not think that his behavior and his psychological make-up fit sadist characterization. The defendant readily admitted that he was

interested in raping these girls but was a reluctant participant in the murders.

This defendant has been raised in this community and the parental marriage has been full of arguments and generally incompatible. Consequently, their problems were frequently brought to the attention of local law enforcement officers. It seems that with all the turmoil in this family, as previously stated by Judge Wheeler, the defendant received no guidance and was allowed to do as he pleases. According to the defendant, the parents are in the process of getting a divorce. The defendant's record in school was also poor, even though he possessed at least average ability and earned fair grades when he did attend and participated in class assignments. The defendant's stay at the juvenile detention home also revealed serious maladjustment problems. The defendant could not follow rules, was destructive and by the defendant's own admission escaped on two different occasions. The defendant was placed in various foster homes. At the time it seemed that the defendant was doing a good job, however, the defendant's continued antisocial conduct and present criminal involvement indicates that the defendant benefitted very little from those placements. The vast amount of material that this agent has examined and discussed with various individuals, this agent has come to the conclusion that this young man has not profited from his past experiences and therefore he is extremely dangerous to all the members of society.

oOo

[1] PEOPLE OF THE STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF KALAMAZOO

THE PEOPLE OF THE STATE OF MICHIGAN,

v B 723 00 140'FY

BRENT EUGENE KOSTER, SENTENCE

Defendant.
_____/

Proceedings had in the above-entitled cause, before Honorable Patrick H. Mc Cauley, Circuit Judge, on July 21, 1975, at Kalamazoo, Michigan.

APPEARANCES:

FRED DAVISON, ESQ., Asst, Pros. Att'y
Appearing on behalf of the People

JAMES D. HILLS, ESQ.
Appearing on behalf of Defendant.

- - -

[2]Kalamazoo, Michigan
July 21, 1975

MR. DAVISON: May it please the Court, the next matter before the Court today is the People v Brent Koster, File B 723 00 140 FY. We are here for the purposes of sentencing.

THE COURT: Mr. Hills, you are here with your client, Mr. Koster, for purposes of sentencing. You have had an opportunity to review the presentence report, Mr. Hills?

MR. HILLS: That is correct. I have read it. It is full and complete. I have no additions or subtractions.

I take that back. I do have one. My client informs me the days credited are listed at 1051. He says it should be 1052.

THE COURT: For one day I will correct it.

MR. HILLS: Other than that I have no additions or subtractions. My client has read it a few minutes ago. He indicated he has no additions or subtractions either. He only made one request, it that he want to talk to his Honor outside the hearing of the public. I am relating that to you at this time.

THE COURT: Mr. Koster, you read the presentence report?

DEFENDANT: Yes.

THE COURT: You wish to talk with the Judge, okay. I will step off the bench and go in chambers, and I will talk to you.

(Whereupon the Court, defendant, the attorneys, and a Court [3]Officer retired to chambers. In a short time they returned to the courtroom, and the proceedings continued as follows:)

THE COURT: Let the record show we have been in chambers. Mr. Hills, you have been in chambers with your client?

MR. HILLS: That is correct, your Honor.

THE COURT: I believe the prosecutor, Mr. Davison,

was present, and also the bailiff.

Is there anything else I need to know before I pronounce sentence?

MR. HILLS: I have nothing further.

THE COURT: Mr. Koster?

DEFENDANT: No.

THE COURT: Mr. Koster, I have gone over your presentence report. I looked the mater over. I have studied it. I may as well pronounce sentence, and then I can say what I want, because quite often people don't listen until you pronounce sentence.

It is ordered that you, Brent Eugene Koster, shall be forthwith committed to the State Prison of Southern Michigan, in Jackson County, for the purpose of classification, and confined in such state penal institution as shall be duly designated for a period which will be the rest of your natural life. I am sentencing you to life imprisonment.

I am also recommending that you never be considered for release from the institution.

I am also recommending that you not be put in the same [4]institutiuon with one Danny Ranes.

I have reviewed the whole matter, Mr. Koster. The crimes you and Mr. Ranes are guilty of are the types of crime that justifies, in my opinion, consideration of re-establishing the death penalty. These are the type of things that disturb the public, disturb people, and these are the types of crime that give the ammunition to the people who want to restore the death penalty, because throughout this whole episode they have a strong argument for a life for a life .

What my personal beliefs are is immaterial. I do feel, Mr. Koster, that you should not ever be released back into free society.

I recognize that you are being sentenced for second degree murder. I also recognize that at the end of ten years the law is mandatory that the Parole Board must review your sentence. They must consider you for parole. That is why I

am putting in this sentence that I personally, as judge of this court, recommend that you never be released on parole, so they will have to consider my recommendation at the end of ten years.

I also must give you credit for 1052 days already served.

I don't think, Mr. Koster, there is much sense in me going over the details of what happened. There isn't much sense of me raising all that again. I do think you, by cooperating with the authorities, through your attorney, and testifying against Danny Ranes, you helped clear up three murders and [5]convicted, or assisted in convicting, Danny Ranes of first degree murder. In exchange for that the prosecution accepted a plea bargain proposed by your attorney and the police and the prosecutor whereby you would plead to second degree murder. I am not so sure that was the best agreement in the world. At the time I believe the police and the prosecutor believed it was necessary to do this in order to convict Danny Ranes, who apparently was the older of the two, and apparently in the prosecutor's mind it was necessary to do this in order to convict Danny Ranes. I am not so sure at this stage, from what we know, it could not have been done without that, but hindsight is always better than foresight.

Your attorney has done an extremely valuable service for you, Mr. Koster. The fact that you have to come up mandatorily for parole in ten years is something in your behalf.

My recommendation is not binding on the parole people. There is a possibility that you might be released from prison before serving the rest of your natural life. I am hoping not, but they might overrule my recommendations, and somebody in the prison system might release you.

Is there anything anyone else would like to add?

I believe, Mr. Davison, in accordance with the plea bargain on this case, you wanted to move at this time to

dismiss the first count, of first degree murder, in this case?

MR. DAVISON: Not in this particular file, your Honor.

[6]THE COURT: Wasn't there a first degree charge in this case?

MR. HILLS: Yes, Your Honor.

MR. DAVISON: Yes, but it is in File 723-139B.

THE COURT: Are you going to dismiss the first count here?

MR. DAVISON: That is correct. We dismiss the first count.

MR. HILLS: No objection, your Honor.

THE COURT: There is no objection, Mr. Koster, to the first count of first degree murder being dismissed, is there?

DEFENDANT: No.

THE COURT: With no objection and being part of the plea bargain, the motion to dismiss the first count of the first degree murder is granted.

Mr. Koster, I have to give you the following notice:

You are advised that you are entitled as a matter of constitutional right to appellate review of your conviction. If you are financially unable to provide a lawyer to perfect such appeal the Court will appoint a lawyer for you and will furnish a lawyer with such portions of the trial transcript the lawyer requires to prepare post-conviction motions and perfect an appeal.

Such request for assistance of a lawyer must be made within sixty days.

If you desire the appointment of a lawyer you must return this form directly to the judge within sixty days from this date.

[7]I am dating this July 21, 1975. Will you give this to your client, Mr. Hills, and have him sign it and acknowledge that you have it?

MR. HILLS: Your Honor, my client has signed it, and I return it.

THE COURT: Give it to your client.

I have one other case here with your client, Mr. Hills, Case No. B 723 00 139 FY, People v Brent Koster. I believe this is the case involving -

MR. DAVISON: Claudia Bidstrup.

THE COURT: - Claudia Bistrup. What is your desire on that, Mr. Prosecutor?

MR. DAVISON: I move this case be dismissed.

MR. HILLS: We have no objection to the charge of first degree murder being dismissed.

THE COURT: Again, Mr. Koster, I am sure you have not objection. This is a charge of first degree murder as against one Claudia Bidstrup. As part of the plea bargain agreement made between yourself, your attorney, the prosecuting attorney, and the Sheriff's Department, it was agreed this case would be dismissed at time of sentence on Case B 723 00 140 FY. I am bound by that agreement. I am therefore granting the motion to dismiss Case No. B 723 00 139 FY.

MR. HILLS: Thank you, your Honor.

THE COURT: Thank you, gentlemen.

[8]MR. DAVISON: Thank you, you Honor.

- - -

I hereby certify that the foregoing is the full, true, and correct transcript of the proceedings had at the sentencing of the defendant in the above matter, at the time and place in the caption hereof set forth.

/s: Patrick H. McCauley
CIRCUIT JUDGE

Sixth Amendment
to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Fourteenth Amendment
to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[1]Brent E. Koster
P.O. BOX E - #142253
Jackson, MI 49204

September 11, 1992

The Honorable John F. Foley
Kalamazoo Circuit Court
227 W. Michigan Ave
Kalamazoo, MI 49007

Re: *People v Koster, Circuit Court No. 723-00-140FY*

Dear Judge Foley:

This letter is a belated request for appointment of appellate counsel.

I was arrested in 1972 as a juvenile (15 years old) for murder, waived from the juvenile court, plead guilty, and sentenced to life. I never appealed the conviction or sentence. An interlocutory appeal, however, was filed that raised juvenile waiver issues. This was the extent of my appeal. The main issue that I would like to raise relates to my plea-based bargain and its illusory nature as it specifically relates to the sentence. The guilty plea was a result of plea negotiations which reduced two charges of first degree to one second degree murder charge in exchange for testimony against my co-defendant. The former prosecutor offered me a plea-bargain early in the proceedings (during my juvenile preliminary examination). He was very interested in my testimony against my co-defendant (who was 14 years my senior, had been recently released from prison, and had two prior conviction for sex offenses). Throughout the negotiations, I was lead to believe that even if I were to be given a life sentence on the reduced charge, as opposed to a number of years, I would be

eligible for parole after 10 calendar years and the parole board could parole me. It was pointed out to me by my attorney as well as the former prosecutor that there is a vast difference between first and second degree murder and that my attorney's negotiated plea on my behalf was a good deal. Ultimately, I was sentenced to a life sentence for second degree murder in exchange for my testimony and the other charge of first degree was dismissed. The sentencing judge, however, recommended that I never be released from prison. The judge at sentencing did indicate that his recommendation was not binding on the parole board. See attached sentencing transcript.

The problem that I have with the sentencing portion of the plea-bargain is that the judge during sentencing explicitly negated the terms of the plea-bargain by stating that I should never be released from prison. I was lead to believe from the very beginning that by pleading guilty to second degree murder that I would have to serve time, but that even if [2]I received a life sentence I would be eligible for parole after 10 years. This was even brought out at the trial of my co-defendant and was a major issue. The judge's statement at sentencing effectively undercut any chance that I have for parole, or at least any probability of parole. The judge's statement effectively "nullified" any benefit that was the basis for entering into the plea agreement. Essentially, the judge eliminated any expectation of parole in my case.

I'm fully aware of the fact that the parole board's decision in granting a parole in my case is purely discretionary and that I would realistically serve more than the mandatory 10 years, but it has become painfully clear to me over the years since that 10th year anniversary that the parole board has drastically changed its position on granting paroles and the judge's recommendation would weigh heavily in any consideration that the parole board would give to my case. At sentencing,

the prosecuting attorney did not make any recommendation. The prosecuting attorney's lack of a recommendation as to sentencing is unusual. I do believe the prosecuting attorney declined to make a recommendation because of the plea agreement.

In making parole decisions, the parole board routinely defers to the Judge's recommendations. As you are probably well aware, the parole board reviews the record of sentence and the PSI. While the PSI does not explicitly recommend any sentence, the record of sentence clearly states the recommendation of the sentencing judge. Undoubtably, the parole board would take note of the court's recommendation and abide by it. Any expectation or probability of parole is further complicated by the mounting public debate of the decisions of the parole board in light of the Leslie Williams case. The entire parole board structure is also being modified by the legislature. The parole board, upon reading the judge's recommendation and/or the record of sentence, will not give me any consideration for parole. I derived no realistic benefit by entering into the plea-bargain as a consequence of the judge's recommendations, and it is illusory in nature.

Essentially, my argument boils down to this: while the parole board can theoretically parole me anytime after 10 years (this would have been in 1982) in reality this will not happen because the policy of the parole board is to defer their decisions to the recommendation of the sentencing judge. The sentencing recommendation has negated the benefit of the plea bargain and it is therefore illusory. The long and short of the situation is that the parole board will not exercise its own decision-making powers because it will defer to the sentencing recommendation and not consider my case any further.

I have discussed my dilemma with a number of individuals. In particular, I've discussed the matter with two members of the

Board of Directors of Prison Legal Services (where I have been employed for the past 14 years; currently as a computer programmer). Art Tarnow and Barbara Levine both recommended that I write you, explain my situation and ask you to appoint the State Appellate Defenders Office to file a brief detailing the issue.

[3]I do agree with them for a number of reasons. First, I could attempt to write my own brief, but I feel that SADO would be able to do a lot better job than I can. I believe that the matter could possibly involve an evidentiary hearing on the issue of sentencing. Secondly, filing a motion of this type after so many years is best left to the "professionals" rather than filing it myself. Third, there is always the issue of objectivity. I firmly believe in the adage that a person who is his own lawyer has a fool for a client.

In addition, the county clerk's office has informed me that the guilty plea transcript is not available (it was never transcribed and the notes are missing from the file and the original stenographer is in a nursing home). In addition to the issue regarding sentencing, there are a number of other issues which I feel should be raised. Some are complicated juvenile jurisdictional questions and an attorney can only make a proper presentation of them. Of course, if an appointment is completely out of the question, I'll understand.

I would be remiss in not stating my sentiments. The most agonizing part of this letter is expressing my feelings on what I did that lead to my incarceration.

Over the years I have had more then ample opportunity to think about my crime and exactly why I did it. The words do not come easy.

In my early teens, I was wild; there is no other way to put it. My parents didn't exercise much, if any, control over me. Although it was never brought out in my PSI report, in my early childhood my mother was hospitalized several times for mental health problems. My father, trying to cope with that and raise 6 children, drank excessively. I basically did what I wanted to do and thought little about the consequences. I ran away from home on a number of occasions and the last time that I did is when I met my co-defendant. He was much older than I and, foolishly, I looked-up to him. At that age, I was highly impressionable. He let me work with him at his job. I was allowed to use his car, even though I was only 15. We had talked about women. He also told me that he had been just released from prison.

He started talking about rape. He stated that he had raped many women and served time for it. He started to talk about "plans" on doing it again. Eventually, I became a participant in those "plans".

I finally "woke-up" to the reality of what we were doing and I went back home. I realized what I had done. I didn't know what to do and I discussed it with a friend of mine. That discussion is what lead to my arrest.

I am not the 15 year old boy that I was in 1972. Prison is a harsh environment, but I feel that I have made the best of it. I've literally grown up in this environment and I've seen and heard of situations that would boggle your mind. I know there is no way to compensate the victims or their families, but the last 20 years have allowed me to gain an insight into my crime, myself and life in general. I now realize that life is precious.

[4]I believe that I am leading as productive and positive a life as is possible in prison. I have been deeply involved in PLS's efforts to computerize and provide high quality legal

assistance to indigent prisoners. This is a very worthwhile program and my work here is very satisfying to me. If I am ever released, I will continue to work with computers and build a life with my family.

I realize that my request is extraordinary in a number of respects. So, is my situation. I do hope that you will appoint counsel and give me the chance to present the legal issue as well as myself for consideration. I am willing to submit to any kind of psychological evaluation that you deem appropriate.

Thank you for your time and consideration.

Very truly yours,

/s: Brent E. Koster
Brent E. Koster

Enc.

AFFIDAVIT OF JAMES D. HILLS

STATE OF MICHIGAN)
) SS:
COUNTY OF KALAMAZOO)

I, JAMES D. HILLS, have personal knowledge of the facts attested to below, and being first duly sworn, say:

1. I am an attorney of law licensed to practice in Michigan.
2. On July 21, 1975, I represented Brent Eugene Koster, the Defendant, in a felony criminal proceeding in the Kalamazoo County Circuit Court before the Honorable Patrick H. McCauley, Circuit Court Judge, file number B 723-00-140FY.
3. The standard practice of the circuit court at that time was for the sentencing judge to hold an in-chambers pre-sentence conference and the judge would then state the sentence he had determined to impose at the in-court sentencing hearing.
4. On July 21, 1975, a sentencing hearing was scheduled. Prior to the actual sentence proceeding, I was present at a pre-sentence conference in Judge McCauley's chambers.
5. Present at this conference, in addition to me, were Judge McCauley, an Assistant Prosecuting Attorney, and the Pre-Sentence Investigator.
6. During this in-chambers conference, arguments were made by the Prosecuting Attorney, the Pre-Sentence Investigator, and myself to Judge McCauley regarding the sentence of Mr. Koster.
7. During this in-chambers conference, the sentence of my client, Brent Eugene Koster, was discussed and Judge McCauley make it clearly known to both parties that he was going to sentence my client to life

imprisonment.

8. Judge McCauley subsequently imposed a sentence of life imprisonment upon my client.

9. In light of this statement by Judge McCauley, I did not say anything at the actual sentencing proceeding when asked by Judge McCauley if there was anything further.

10. I have read the foregoing statements and they are true to the best of my knowledge, information and belief, and if called upon to testify as a witness as to the validity of these statements I am competent.

/s: James D. Hills
JAMES D. HILLS

Subscribed and Sworn to Before Me On This 18th Day of August, 1998.

/s: Tani S. Carl /
Notary Public, Van Buren County, Mich.
My Commission Expires: 12/11/98

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF KALAMAZOO

PEOPLE OF THE STATE OF MICHIGAN,

Lower Court No. 723-00-140FY

Plaintiff,

Honorable John F. Foley

-vs-

BRENT EUGENE KOSTER,

Defendant.

_____/

AFFIDAVIT OF BRENT E. KOSTER

STATE OF MICHIGAN)
) SS:
COUNTY OF JACKSON)

I, BRENT E. KOSTER, have personal knowledge of the facts attested to below, and being first duly sworn, say:

1. I am the Defendant in the felony criminal proceeding in the above captioned case.
2. On July 21, 1975, I was represented by attorney James D. Hills. He and I briefly met just prior to the in-court sentencing hearing.
3. Mr. Hills informed me that the judge was going to sentence me to life in prison; I told Mr. Hills that I wanted to talk to the Judge outside the presence of the public.
4. At the sentencing hearing, Mr. Hills conveyed my request to Judge McCauley and the request was

granted.

5. During the brief in-chambers conference, I told Judge McCauley that my attorney had informed me that he was going to give me a life sentence. I asked Judge McCauley why he felt that was an appropriate sentence in light of the fact that I testified truthfully against co-defendant as required by the plea bargain and the only real value of the plea bargain to me was the length of sentence.

6. Judge McCauley responded in a very heated manner, stating that I was responsible for multiple deaths and that they were of a heinous nature.

7. I then told Judge McCauley that it sure wasn't much of a bargain and the conference ended.

8. My attorney did not say anything on my behalf at sentencing.

9. I did not say anything at the sentencing hearing because my attorney did not say anything; he had previously told me that the judge was going to give me life in prison and that was confirmed by the Judge's remarks in chambers; I felt that it would not do any good for me to say anything because the Judge had already made up his mind.

10. At the in-court sentencing hearing, the Judge imposed a life sentence.

11. My attorney never discussed allocution with me or helped me prepare for sentencing. I did not even know that I would be asked to say anything.

12. My attorney did not tell me about the in-chambers pre-sentence conference between him, the judge, the prosecutor and the presentence investigator and I did not learn about it until sometime in July 1998.

13. I have read the foregoing statements and they are true to the best of my knowledge, information and belief, and if called upon to testify as a witness as to the validity of these statements I am competent.

/s: Brent E. Koster
BRENT E. KOSTER

Subscribed and Sworn to Before Me
On This 16th Day of October, 1998.

/s: Sandra Girard /
NOTARY PUBLIC, Jackson County, Michigan
My commission expires: 02-28-98

AFFIDAVIT OF DR. WILLIAM D. BROOKS

STATE OF MICHIGAN)
) SS:
COUNTY OF KALAMAZOO)

I, WILLIAM D. BROOKS, have personal knowledge of the facts attested to below, and being first duly sworn, say:

1. I am a psychologist licensed to practice in Michigan.
2. During July and August 1998, Brent Eugene Koster was a patient of mine regarding a felony criminal proceeding in the Kalamazoo County Circuit Court, file number 72-300140-FC.
3. My evaluation of Mr. Koster consisted of compiling background information and conducting interviews with many people who knew Mr. Koster. As part of my evaluation, Mr. Koster participated in many personality tests, and many personal interviews. My evaluation then culminated in an in-depth psychological report that was submitted to the court.
4. In July and August 1998, during my compilation of the background information, I interviewed defense counsel, Mr. James D. Hills, who had represented Mr. Koster in the criminal proceedings described above.
5. One of the question specifically posed to Mr. Hills was why he did not say anything at the sentence hearing. Mr. Hills said that things were done differently then and that he attended an in-chambers conference with the Judge and prosecutor prior to the actual sentence hearing where the Judge made it clearly known that he was going to announce a life sentence at the sentence hearing. Mr. Hills stated that this is the reason why he did not say anything at the actual time of sentencing.
6. I conveyed this information to Mr. Koster who was surprised to learn of this sentence conference. He did

not know that this sentence conference had taken place prior to his sentence hearing.

7. I have read the foregoing statements and they are true to the best of my knowledge, information and belief, and if called upon to testify as a witness as to the validity of these statements I am competent.

/s: William D. Brooks
William D. Brooks, Ed.D.

Subscribed and Sworn to Before Me
On This 18th Day of December, 2001.

/s: Jeannyne M. Depoian /
Notary Public, Kalamazoo Co, State of Michigan
My Commission Expires: 10/01/02

Prosecutor's Brief in Opposition, filed with the Michigan Court of Appeals, p 27, Jan. 15, 2001

Defendant argues, as he did below, that his right to allocution was rendered meaningless because Judge McCauley had already determined his sentence during an in-chambers presentence conference. In 1975, it was standard practice for the courts to hold such conferences. While in chambers, and generally outside the presence of the defendant, the sentencing judge would announce the sentence it intended to impose after first hearing argument from the prosecutor, the defense attorney, and the presentence investigator. The parties would then go out on the record for a formal sentence hearing. That same procedure was followed in this case; and now, over twenty-three years later its lawfulness is being challenged by Defendant.

Defendant does not contest that his attorney argued on his behalf during the in-chambers conference, nor that he was ultimately given the chance to separately address the court during the sentencing hearing. Instead, he argues only that he could not effectively allocute when the Court had already made up its mind concerning his sentence. He also finds fault with the fact that he was not present when the in-chambers conference was held, and asks to be resentenced on that basis. As the lower court properly determined, Defendant is not entitled to the relief requested.

M.C.L. 791.234

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 791. DEPARTMENT OF CORRECTIONS
DEPARTMENT OF CORRECTIONS
CHAPTER III. BUREAU OF PARDONS AND PAROLES; PAROLE BOARD

791.234. Prisoners subject to parole board jurisdiction; indeterminate and other sentences; prisoners subject to disciplinary time; consecutive terms; termination of sentences; release on parole, conditions; public record; time of release; review; effective date

Sec. 34. (1) Except as provided in section 34a, a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years other than a prisoner subject to disciplinary time is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits, if applicable.

(2) Except as provided in section 34a, a prisoner subject to disciplinary time sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted.

(3) If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served

the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

(4) If a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

(5) If a prisoner other than a prisoner subject to disciplinary time has 1 or more consecutive terms remaining to serve in addition to the term he or she is serving, the parole board may terminate the sentence the prisoner is presently serving at any time after the minimum term of the sentence has been served.

(6) A prisoner under sentence for life, other than a prisoner sentenced for life for murder in the first degree, or sentenced for life for a violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750 .200 to 750.212a, who has served 10 calendar years of the sentence in the case of a prisoner sentenced for any other crime committed before October 1, 1992, or, except as provided in subsection (10), who has served 20 calendar years of the sentence in the case of a

prisoner sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, who has another conviction for a serious crime, or, except as provided in subsection (10), who has served 17-1/2 calendar years of the sentence in the case of a prisoner sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, who does not have another conviction for a serious crime, or who has served 15 calendar years of the sentence in the case of a prisoner sentenced for any other crime committed on or after October 1, 1992, is subject to the jurisdiction of the parole board and may be released on parole by the parole board, subject to the following conditions:

(a) At the conclusion of 10 calendar years of the prisoner's sentence and thereafter as determined by the parole board until the prisoner is paroled, discharged, or deceased, and in accordance with the procedures described in subsection (7), 1 member of the parole board shall interview the prisoner. The interview schedule prescribed in this subdivision applies to all prisoners to whom this subsection is applicable, regardless of the date on which they were sentenced.

(b) In addition to the interview schedule prescribed in subdivision (a), the parole board shall review the prisoner's file at the conclusion of 15 calendar years of the prisoner's sentence and every 5 years thereafter until the prisoner is paroled, discharged, or deceased. A prisoner whose file is to be reviewed under this subdivision shall be notified of the upcoming file review at least 30 days before the file review takes place and shall be allowed to submit written statements or documentary evidence for the parole board's consideration in conducting the file review.

(c) A decision to grant or deny parole to a prisoner so

sentenced shall not be made until after a public hearing held in the manner prescribed for pardons and commutations in sections 44 and 45. Notice of the public hearing shall be given to the sentencing judge, or the judge's successor in office, and parole shall not be granted if the sentencing judge, or the judge's successor in office, files written objections to the granting of the parole within 30 days of receipt of the notice of hearing. The written objections shall be made part of the prisoner's file.

(d) A parole granted under this subsection shall be for a period of not less than 4 years and subject to the usual rules pertaining to paroles granted by the parole board. A parole ordered under this subsection is not valid until the transcript of the record is filed with the attorney general whose certification of receipt of the transcript shall be returnable to the office of the parole board within 5 days. Except for medical records protected under section 2157 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2157, the file of a prisoner granted a parole under this subsection is a public record.

(e) A parole shall not be granted under this subsection in the case of a prisoner who is otherwise prohibited by law from parole consideration. In such cases the interview procedures in section 44 shall be followed.

(7) An interview conducted under subsection (6)(a) is subject to both of the following requirements:

(a) The prisoner shall be given written notice, not less than 30 days before the interview date, stating that the interview will be conducted.

(b) The prisoner may be represented at the interview by an individual of his or her choice. The representative shall not

be another prisoner. A prisoner is not entitled to appointed counsel at public expense. The prisoner or representative may present relevant evidence in favor of holding a public hearing as described in subsection (6)(b).

(8) In determining whether a prisoner convicted of violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, and sentenced to imprisonment for life before October 1, 1998 is to be released on parole, the parole board shall consider all of the following:

(a) Whether the violation was part of a continuing series of violations of section 7401 or 7403 of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, by that individual.

(b) Whether the violation was committed by the individual in concert with 5 or more other individuals.

(c) Any of the following:

(i) Whether the individual was a principal administrator, organizer, or leader of an entity that the individual knew or had reason to know was organized, in whole or in part, to commit violations of section 7401 or 7403 of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, and whether the violation for which the individual was convicted was committed to further the interests of that entity.

(ii) Whether the individual was a principal administrator, organizer, or leader of an entity that the individual knew or had reason to know committed violations of section 7401 or 7403 of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, and whether the violation for which the individual was convicted was committed to further

the interests of that entity.

(iii) Whether the violation was committed in a drug-free school zone.

(iv) Whether the violation involved the delivery of a controlled substance to an individual less than 17 years of age or possession with intent to deliver a controlled substance to an individual less than 17 years of age.

(9) Except as provided in section 34a, a prisoner's release on parole is discretionary with the parole board. The action of the parole board in granting a parole is appealable by the prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted. The appeal shall be to the circuit court in the county from which the prisoner was committed, by leave of the court.

(10) If the sentencing judge, or his or her successor in office, determines on the record that a prisoner described in subsection (6) sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, has cooperated with law enforcement, the prisoner is subject to the jurisdiction of the parole board and may be released on parole as provided in subsection (6), 2-1/2 years earlier than the time otherwise indicated in subsection (6). The prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no relevant or useful information to provide. The court shall not make a determination that the prisoner failed or refused to cooperate with law enforcement on grounds that the defendant exercised his or her constitutional right to trial by jury. If the court determines at sentencing that the defendant cooperated with law enforcement, the court shall include its determination in

the judgment of sentence.

(11) As used in this section:

(a) "Serious crime" means violating or conspiring to violate article 7 of the public health code, 1978 PA 368, MCL 333.7101 to 333.7545, that is punishable by imprisonment for more than 4 years, or an offense against a person in violation of section 83, 84, 86, 87, 88, 89, 316, 317, 321, 349, 349a, 350, 397, 520b, 520c, 520d, 520g, 529, 529a, or 530 of the Michigan penal code, 1931 PA 328, MCL 750.83, 750.84, 750.86, 750 .87, 750.88, 750.89, 750.316, 750.317, 750.321, 750.349, 750.349a, 750.350, 750.397, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, 750.529a, and 750.530.

(b) "State correctional facility" means a facility that houses prisoners committed to the jurisdiction of the department, and includes a youth correctional facility operated under section 20g by the department or a private vendor.

MCR 6.425

WEST'S MICHIGAN RULES OF COURT
MICHIGAN COURT RULES OF 1985
CHAPTER 6. CRIMINAL PROCEDURE
SUBCHAPTER 6.400 TRIALS

RULE 6.425 SENTENCING; APPOINTMENT OF APPELLATE COUNSEL

(A) Presentence Report; Contents. Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include:

(1) a description of the defendant's prior criminal convictions and juvenile adjudications,

(2) a complete description of the offense and the circumstances surrounding it,

(3) a brief description of the defendant's vocational background and work history, including military record and present employment status,

(4) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,

(5) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,

(6) information concerning the financial, social,

psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,

(7) if provided and requested by the victim, a written victim's impact statement as provided by law,

(8) any statement the defendant wishes to make,

(9) a statement prepared by the prosecutor on the applicability of any consecutive sentencing provision,

(10) an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report,

(11) a specific recommendation for disposition, and

(12) any other information that may aid the court in sentencing.

Regardless of the sentence imposed, the court must have a copy of the presentence report and of any psychiatric report sent to the Department of Corrections. If the defendant is sentenced to prison, the copies must be sent with the commitment papers.

(B) Presentence Report; Disclosure Before Sentencing. The court must permit the prosecutor, the defendant's lawyer, and the defendant to review the presentence report at a reasonable time before the day of sentencing. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for

nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C) Presentence Report; Disclosure After Sentencing. After sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and any attachments to it. The court must exempt from disclosure any information the sentencing court exempted from disclosure pursuant to subrule (B).

(D) Imposition of Sentence.

(1) Sentencing Guidelines. The court must use the sentencing guidelines, as provided by law. Not later than the date of sentencing, the court must complete a sentencing information report on a form to be prescribed by and returned to the state court administrator.

(2) Sentencing Procedure. The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing the court, complying on the record, must:

(a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,

(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the

presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (D)(3),

(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,

(d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,

(e) articulate its reasons for imposing the sentence given, and

(f) if a victim of the crime has suffered harm and the court does not order restitution as provided by law or orders only partial restitution, state the reasons for its action.

(3) Resolution of Challenges. If any information in the presentence report is challenged, the court must make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

(E) Advice Concerning the Right to Appeal;

Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to appellate review of the conviction and sentence,

(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and

(c) the request for a lawyer must be made within 42 days after sentencing.

(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to file an application for leave to appeal;

(b) if the defendant is financially unable to retain a lawyer, the court must appoint a lawyer to represent the defendant on appeal if

(i) the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines,

(ii) the defendant seeks leave to appeal a conditional plea under MCR 6.301(C)(2),

(iii) the prosecuting attorney seeks leave to appeal, or

(iv) the Court of Appeals or the Supreme Court grants the defendant's application for leave to appeal;

(c) if the defendant is financially unable to retain a lawyer, the court, in its discretion, may appoint a lawyer to represent the defendant on appeal if all the following apply:

[i] the defendant seeks leave to appeal on the basis of an alleged improper scoring of an offense variable or a prior record variable,

[ii] the defendant objected to the scoring or otherwise preserved the matter for appeal, and

[iii] the sentence constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored; and

(d) the request for a lawyer must be made within 42 days after sentencing, unless the entitlement to counsel arises under (b)(iii) or (iv).

With regard to paragraphs (b) and (c), the court is required to give only the advice that is applicable to the particular circumstances.

Upon sentencing, the court shall give the defendant a form developed by the State Court Administrative Office that the defendant may complete and file as an application for leave to appeal.

(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer. The 42-day time limit

does not apply if the entitlement to counsel arises under subrule (2)(b)(iii) or (iv).

(4) When imposing sentence in a case in which sentencing guidelines enacted in 1998 PA 317, MCL 777.1 et seq.; MSA 28.1274(11), et seq., are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines.

(F) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) Appointment of Lawyer.

(a) Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.

(b) In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal.

(c) Scope of Appellate Lawyer's Responsibilities. The responsibilities of the appellate lawyer appointed to represent

the defendant include representing the defendant

(i) in available postconviction proceedings in the trial court the lawyer deems appropriate,

(ii) in postconviction proceedings in the Court of Appeals,

(iii) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or 7.211(C)(1), and

(iv) as appellee in relation to any postconviction appeal taken by the prosecutor.

(2) Order to Prepare Transcript. The appointment order also must

(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,

(i) the trial or plea proceeding transcript,

(ii) the sentencing transcript, and

(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and

(b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System.

(3) Order as Claim of Appeal; Trial Cases. In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order described in (F)(1) and (2) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Appointment of Counsel," and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in subrule (F)(2). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

GCR 785.8 Sentencing. Before sentence is imposed the court shall:

> (1) require the presence of defendant's lawyer unless affirmatively waived by defendant;
>
> (2) give defendant and his lawyer a reasonable opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence;
>
> (3) state the minimum and maximum sentence imposed by the court, together with any credit for the time served to which the defendant may be entitled.

Provisions of sub-rule 785.8 are mandatory and failure to comply shall require resentencing.

See 389 Mich. lvii, adopted March 16, 1973, effective June 1, 1973.

298 N.W.2d 434, 409 Mich. 774, People v. Berry, (Mich. 1980)

298 N.W.2d 434

409 Mich. 774

Supreme Court of Michigan.

PEOPLE of The State of Michigan, Plaintiff-Appellant,
v.
Joyce BERRY, a/k/a Annette Williams, Defendant-Appellee.
PEOPLE of The State of Michigan, Plaintiff-Appellee,
v.
Joyce BERRY, a/k/a Annette Williams, Defendant-Appellant.
PEOPLE of The State of Michigan, Plaintiff-Appellee,
v.
Edward LONG, Defendant-Appellant.
Nos. 62979, 62980, 63090, 63091 and 63164.
Nov. 24, 1980.

Defendant was convicted in the Recorders Court, Wayne County, Michael J. Connor, J., of armed robbery, assault with intent to rob while armed, and two counts of possession of firearm during commission of felony, and defendant appealed. The Court of Appeals, V. J. Brennan, J., 88 Mich.App. 788, 279 N.W.2d 316, reversed in part and affirmed in part, and defendant again appealed. Appeal was consolidated with appeal of separate defendant on conviction of armed robbery, and the Supreme Court held that: (1) court rule governing sentencing required that both defendants and their counsel be given opportunity to address court before sentencing; (2) defendant was denied right of allocution at sentencing, notwithstanding court's inquiry whether defendant knew of any reason why "you should not be

sentenced today"; (3) existence of sentence bargain did not create exception to defendant's right of allocution; (4) court rule governing sentencing requires that in all cases trial court inquire specifically of defendant separately whether he or she wishes to address court before sentence is imposed; and (5) rule against double jeopardy did not prohibit separate convictions on both felony firearm and underlying felonies.

Convictions reinstated; sentences set aside; remanded.

*435 [409 Mich. 775] Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., Lansing, for plaintiff in both cases.

William L. Cahalan, Pros. Atty., Edward Reilly Wilson, Principal Atty., Appeals, and Timothy C. Scallen, Asst. Pros. Atty., Lansing, for plaintiff in Berry.

James J. Gregart, Pros. Atty., and Judy A. Hughes, Appellate Asst. Pros. Atty., Lansing, for plaintiff in Long.

Joyce A. Berry, in pro. per.

Robert E. Slameka, Detroit, for defendant Berry.

John A. Lydick, Asst. State Appellate Defender, Detroit, for defendant Long.

PER CURIAM.

These cases have been consolidated for the purpose of making clear the nature of a criminal defendant's right of allocution before sentencing. The claim of each defendant arises from distinct trial court proceedings briefly set out below.

Defendant Berry

The defendant pleaded guilty on October 11, 1977 to separate charges of armed robbery, M.C.L. s 750.529; M.S.A. s 28.797; assault with intent to rob while armed, M.C.L s 750.89; M.S.A. s 28.284; and two counts of possession of a firearm during commission[409 Mich. 776] of a felony, M.C.L s 750.227b; M.S.A. s 28.424(2). Pursuant to a plea bargain with the prosecuting attorney and a sentence bargain with the trial court, the defendant was sentenced to a total of not less than 7 nor more than 15 years in prison.

At sentencing, after stating that the sentence bargain called for imprisonment of 7 to 15 years, the Court said:

> "THE COURT: All right. Is there anything you want to say before I impose sentence?
>
> "MR. WOLNEY: Richard T. Wolney, appearing on behalf of the defendant in 77-06332. I have had an opportunity to read the Presentence Report and I believe that it's accurate factually in its basis.
>
> "THE COURT: Is there anything you want to say?
>
> "MS. GASKIN: ([FN1]) Deborah Gaskin appearing for the defendant. I also had an opportunity to review the report. I would only request that you follow the previously mentioned agreement."

The court then recited at some length the defendant's history of previous convictions, sentences, and prison escapes, commented about her use of heroin, described her sociopathic personality, observed that she apparently lacked remorse for the crimes committed, and imposed the sentence agreed upon.

Defendant Long

The defendant was convicted by a jury of armed robbery, M.C.L. s 750.529; M.S.A. s 28.797, on December 1, 1976. After preparation of a presentence investigative[409 Mich. 777] report, a presentence conference occurred in the court's chambers involving the trial judge, counsel for the defendant, and an assistant prosecuting attorney.

No record was made of the conference in chambers. On December 27, 1976, the defendant was brought before the court and sentenced to confinement for a term of not less than 8 nor more than 20 years. The defendant complains that at sentencing he was denied his right of allocution and is entitled to be resentenced.

At the time of sentencing, the following occurred:

"THE COURT: Is your name Edward Long?

"THE DEFENDANT: Yes, sir.

"THE COURT: Mr. Hills is your attorney; is that correct?

"THE DEFENDANT: Yes, sir.

"THE COURT: Mr. Long, is there any reason why you should not be sentenced today for armed robbery?

"THE DEFENDANT: Not that I know of.

"THE COURT: Mr. Hills, you have discussed this case with me in chambers. Do you wish to add anything further?

"MR. HILLS: There is nothing further. I have discussed it in chambers with yourself and Mr. Mabbitt and the probation agent.

"The only thing that I objected to in chambers was the presentence report of his wife being included in his, because I do not think it adds anything. I would have no chance to rebut that.

"Other than that, I would have no objection, your Honor.

*437 "THE COURT: Mr. Long, you are not a youngster anymore. You are thirty-four years old, according to a report; is that right?

"THE DEFENDANT: Yes, sir.

[409 Mich. 778] "THE COURT: You have not been able to hold a job for very long.

"THE DEFENDANT: No.

"THE COURT: When was the last job you had?

"THE DEFENDANT: I was self-employed for a long time.

"THE COURT: But you were drawing ADC and so forth, with your wife, were you not?

"THE DEFENDANT: No.

"THE COURT: You never have gotten ADC?

"THE DEFENDANT: She might have drawed ADC,

but I didn't draw on ADC.

"THE COURT: Your defense in this case was that you were under the influence of drugs, and that you did not recall what happened?

"THE DEFENDANT: Yes, sir.

"THE COURT: The jury did not feel that this was established sufficiently to acquit you on the charge. Even if this was the case, you are still a dangerous person if you are under the influence of drugs, and if you are carrying a weapon.

"The Court feels that you are a problem, and a danger to society. You have been found guilty and sentenced for armed robbery once before in Calhoun County, have you not?

"THE DEFENDANT: Yes, sir.

"THE COURT: It just seems to me that you have not learned your lesson, and you have to be put out of society for awhile.

"THE DEFENDANT: Well, you Honor, I ain't been back in society since they found me guilty.

"THE COURT: Well, Mr. Mabbitt, do you have anything to say in this matter?

"MR. MABBITT: Nothing that I have not already said in chambers, your Honor.

"THE COURT: Well, it is the sentence of this court that you, Edward Long, shall be forthwith committed to the state prison of Southern Michigan in Jackson County

for the purpose of classification, and shall be confined in such state institution as shall be duly designated for a term not to exceed twenty years, and not less than eight years, from and after this date.

[409 Mich. 779] "I will recommend that you receive psychiatric treatment, if it is available.

"THE DEFENDANT: I would rather not have that recommended.

"THE COURT: Well, you do not have anything to say about it. I am making that recommendation."

I

Both defendants complain that they were denied the right of allocution to which they are entitled under the provisions of GCR 785.8(2) and 785.9.

In relevant part, the court rule provides:

".8 Sentencing. Before sentence is imposed the court shall:

"(2) Give defendant and his lawyer a reasonable opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence;

"Provisions of subrule 785.8 are mandatory and failure to comply shall require resentencing.

".9 Conformity with the practice provided under 785.3 through 785.8 shall affirmatively appear on the record."

We find that in the cases of both defendant Long and

defendant Berry the court did not comply with the requirements of GCR 785.8(2) and 785.9.

[1] The rule requires that the record reflect that both the defendant and his counsel were given the opportunity to address the court before sentencing.

[2] In defendant Long's case, the record at sentencing clearly discloses that the defendant was denied his right of allocution. The court's opening inquiry whether the *438. defendant knew of any reason why [409 Mich. 780] "you should not be sentenced today" addressed the matter about which the court was concerned, but did not extend to the defendant an opportunity to address the court with respect to matters of concern to the defendant. Indeed, later in the colloquy, when the defendant spoke up on his own initiative to state that he preferred that no recommendation be made for psychiatric treatment, he was abruptly cut off by the trial court with the statement: "Well, you do not have anything to say about it. I am making that recommendation." ([FN2])

[3] Nor should the nature of the right of allocution be viewed any differently in cases like defendant Berry's where a sentence bargain has been struck. Sentence bargain or no sentence bargain, the defendant must be given the opportunity to make a statement to the sentencing court in mitigation, extenuation, or justification of the crime for which he is to be sentenced, or in any other respect relevant to the sentence to be imposed. He may wish to supplement or contradict material appearing in the presentence report, even if his attorney does not, or to bring to the court's attention information theretofore undisclosed which could have a bearing upon the justice of the entire proceedings. Moreover, to enable the defendant to address the court before sentence is imposed is more than a harmless charity extended to one about to be imprisoned. It is an important and integral aspect

[409 Mich. 781] of the truth-discovery purpose of the criminal justice process and is specifically mandated by our court rule. No exception exists for cases in which the court has struck a sentence bargain with the accused.

[4] The rule requires strict compliance and should be understood in all cases to require the trial court to inquire specifically of the defendant separately whether he or she wishes to address the court before the sentence is imposed. Ordinarily the inquiry should come immediately before the sentence is pronounced and after the trial court has made such remarks as it deems appropriate concerning the offense involved, the presentence report, the defendant's personal history, the needs of the community, and any other subject.

In the cases before us, it is evident from the records that the defendants were not separately and individually given a reasonable opportunity to address the court. Thus the defendants must be resentenced.

II

[5] The prosecution has also filed a delayed application for leave to appeal in the case of People v. Berry. It is argued that the Court of Appeals erred in setting aside defendant Berry's convictions of felony firearm on the theory that her convictions of the underlying felonies and felony firearm constituted double jeopardy. We agree. Wayne Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793 (1979).

III

Accordingly, pursuant to GCR 1963, 853.2(4), in [409 Mich. 782] lieu of grants of leave to appeal, defendant Berry's convictions of felony-firearm are reinstated, and the sentences imposed in these cases are set aside and each case is remanded

to the trial courts for resentencing.

COLEMAN, C. J., and MOODY, LEVIN, KAVANAGH, WILLIAMS, FITZGERALD and RYAN, JJ., concur.

(FN1.) The multiple charges to which the defendant pleaded guilty and for which the sentence was imposed were brought in two separate cases. The cases were consolidated for guilty plea and sentencing and thus the defendant was represented by two attorneys, Mr. Wolney and Ms. Gaskin.

(FN2.) While it is not a basis for our decision, it is hard to imagine why the defendant "did not have anything to say about" whether the court should recommend psychiatric treatment. Who indeed would be more entitled to be heard on the matter than the proposed involuntary patient? He may have had something very worthwhile to tell the sentencing court about the worth of such a recommendation on the basis of his prior experience with psychiatric treatment in prison, the result of treatment received on earlier occasions, or some other information of value to the court-and if of no value to the court at all, in keeping with both the letter and the spirit of our rule that a citizen about to be incarcerated has a right to speak to the sentencing court.

389 N.W.2d 708, 150 Mich.App. 85, People v. McNeal, (Mich.App. 1985)

*708 389 N.W.2d 708

150 Mich.App. 85

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Anthony Kevin McNEAL, Defendant-Appellant.
Docket No. 83344.
Submitted Sept. 9, 1985.
Decided Nov. 12, 1985.
Released For Publication June 18, 1986.

Defendant was convicted in the Lenawee Circuit Court, on his plea of guilty, of armed robbery, and he appealed. The Court of Appeals affirmed. Defendant sought leave to appeal to the Supreme Court, which, in lieu of granting leave, remanded case for reconsideration. The Court of Appeals remanded case for resentencing. The Circuit Court, John C. Timms, J., imposed same sentence, and defendant appealed. The Court of Appeals held that defendant was denied his right of allocution.

Reversed and remanded.

[150 Mich.App. 86] Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., Nathan T. Fairchild, Pros. Atty., Tonatzin M. Alfaro Garcia, Asst. Atty. Gen., for the People.

State Appellate Defender Officer, Herb Jordan, Asst. Defender, for defendant-appellant.

Before CYNAR, P.J., and HOLBROOK and BEASLEY, JJ.

PER CURIAM.

On December 21, 1984, following a remand from this Court, defendant was resentenced to a term of from 35 to 70 years. The present trial judge imposing the sentence is the successor in office to the trial judge who imposed the original sentence of from 35 to 70 years. Defendant appeals as of right.

On April 7, 1981, defendant pled guilty to armed robbery, M.C.L. § 750.529; M.S.A. § 28.797. In addition to defendant, two other persons were involved in a holdup of a drugstore. Defendant entered into a plea bargain providing that, in exchange for his plea of guilty to armed robbery and felony firearm and for his providing the police with information regarding the theft of a police officer's gun, he would not be prosecuted for theft of the gun and he would not be charged as a habitual offender provided he testified against one of the other persons involved in the armed robbery.

*709 A presentence report was submitted to the court with a sentence recommendation by the probation officer of from 10 to 25 years in prison. According [150 Mich.App. 87] to the presentence report, the police recommended a minimum sentence of from 8 years to a maximum of life. On May 29, 1981, defendant was sentenced to a term of from 35 to 70 years in prison.

Defendant's appeal of his conviction and sentence was as of right. On August 19, 1983, the Court of Appeals affirmed defendant's conviction and also ruled that based on *People v. Burton*, 396 Mich. 238, 243, 240 N.W.2d 239 (1976), it was without authority to review the sentence. Leave to appeal was sought but the Supreme Court, in lieu of granting leave, remanded the case to the Court of Appeals on June 29, 1984,

for the limited purpose of reconsideration in light of *People v. Coles*, 417 Mich. 523, 339 N.W.2d 440 (1983). On October 16, 1984, the Court of Appeals remanded the case to the trial court for reconsideration in light of *People v. Coles, supra.*

On December 21, 1984, the defendant appeared for resentencing before the trial judge who is the successor to the trial judge who initially imposed sentence but who has since retired. An updated presentence report was prepared and submitted by the probation department. The updated presentence report did not have an updated sentence recommendation. In addition to the probation officer's recommendation of from 10 to 25 years, and the police officer's recommendation of from 8 years to a maximum of life, the minimum sentence guideline range as filled out by the probation officer indicated the minimum sentence range of from 72 months to 120 months (from 6 to 10 years). The trial judge sentenced defendant to from 35 to 70 years.

Although defendant raises a number of issues, consideration of one issue is sufficient for disposition of this appeal. Defendant contends that he is [150 Mich.App. 88] entitled to be resentenced because he was not afforded an opportunity to exercise his right of allocution before the sentence was determined by the trial judge.

It is not disputed that a conference in chambers including the defendant, defense counsel, and the prosecutor took place. The trial judge is said to have stated that, irrespective of the range reflected by the sentencing guidelines, he intended to impose the same from 35- to 70-year term originally imposed by the trial court. Following the conference, but prior to sentencing, defendant and defense counsel were offered the right of allocution. Defense counsel questioned the value of the opportunity to speak as the court had already determined the sentence before allocution. The trial judge responded by

stating:

> "THE COURT: Well, I think if you want to, you should--I'm giving you that opportunity, to put on the record whatever you think is relevant as far as a resentence is concerned. I'm here to resentence him. I have told you in Chambers that I do not have any intention of changing the sentence, and I expect to sometime this morning put on the record why I do not intend to do that, but you certainly have the opportunity to give me any reasons that you want as to why I should change the sentence."

Both the defendant and defense counsel, nevertheless, expressed their view of factors that weighed in their favor.

In Michigan, the right of allocution is explicitly embodied in the General Court Rules, specifically GCR 1963, 785.8:

> ".8 Sentencing. Before sentence is imposed the court shall:
>
> * * *
> * * *
>
> [150 Mich.App. 89] "(2) give defendant *and* his lawyer a reasonable opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence * * *." (Emphasis added.)

The court rules admit no contrary argument. A defendant must be given the right of allocution.

Michigan appellate courts have strictly enforced the right of allocution embodied in GCR 1963, 785.8 by remanding for resentencing in numerous cases. *People v. Dozier*, 411 Mich. 888

(1981), *People v. Mersino,* *710. 413 Mich. 925 (1982), *People v. Berry,* 409 Mich. 774, 298 N.W.2d 434 (1980), *People v. Elijah Smith,* 397 Mich. 864, 245 N.W.2d 544 (1976), *People v. Morgan,* 112 Mich.App. 90, 314 N.W.2d 806 (1981), *People v. Clements,* 72 Mich.App. 500, 250 N.W.2d 100 (1976), *People v. Jack Crawford,* 66 Mich.App. 738, 239 N.W.2d 734 (1976), *People v. Brewer,* 60 Mich.App. 517, 522-523, 231 N.W.2d 375 (1975), *People v. Gonzales,* 60 Mich.App. 450, 454, 231 N.W.2d 393 (1975).

[1] It is clear that a defendant must be allowed to exercise his right of allocution *before* sentence is imposed. In *People v. Brooks,* 122 Mich.App. 39, 42-43, 329 N.W.2d 524 (1982), this Court ordered resentencing where allocution was offered to the defendant after sentence was announced:

> "Finally, we agree with defendant that he was denied his right of allocution even though the judge asked defendant if he had anything to say after sentence was imposed. We are compelled by the Supreme Court's authority to hold that failure to comply with GCR 1963, 785.8(2), requires resentence. *People v. Berry,* 409 Mich. 774, 781; 298 N.W.2d 434 (1980). In *Berry,* the Supreme Court stated:
>
> " 'The rule requires strict compliance and should be understood in all cases to require the trial court inquire specifically of the defendant separately whether he or [150 Mich.App. 90] she wishes to address the court before the sentence is imposed. Ordinarily the inquiry should come immediately before the sentence is pronounced and after the trial court has made such remarks as it deems appropriate concerning the offense involved, the presentence report, the defendant's personal history, the needs of the community, and any other subject.
>
> " 'In the cases before us, it is evident from the records

> that the defendants were not separately and individually given a reasonable opportunity to address the court. Thus the defendants must be resentenced.' "

[2] The defendant in this case was denied his right of allocution. To afford the defendant an opportunity to speak after the court, in effect, announces it has no intention of changing the sentence renders the allocution meaningless. Accordingly, resentencing is required. This matter is hereby remanded for resentencing to be imposed by another judge to be assigned to this case. The presentence report is to be brought up to date and shall include a recommendation of the probation department on the sentence.

We make it clear that we have not decided whether, in this case, a 35-year minimum sentence shocks our judicial conscience.

In returning this case for resentencing by another judge, we anticipate the judge will exercise independent discretion, giving consideration to all of the factors properly involved in the imposition of a sentence. Specifically, we do not intend that the sentencing judge will be controlled by the previous sentence. We do not retain jurisdiction.

Reversed and remanded.

309 N.W.2d 170, 411 Mich. 523, People v. Pulley, (Mich. 1981)

*170 309 N.W.2d 170

411 Mich. 523

Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
James Corzel PULLEY, Defendant-Appellant.
Docket No. 62820.
Calendar No. 2.
Argued May 6, 1980.
Decided Aug. 24, 1981.

Defendant appealed from decision of the Court of Appeals, which affirmed his conviction before the Circuit Court, County of Kent, George V. Boucher, J., of unlawful delivery of heroin and one count of conspiracy to deliver heroin. The Supreme Court held that: (1) in absence of showing that what transpired at in-chambers, off-the-record presentence conference between sentencing judge and defendant's attorney was objectionable in any fashion, defendant was not prejudiced in his opportunity for allocution and to refute the contents of the presentence report by his absence from that conference, and (2) an accused is not required to be present, upon request, at in-chambers, off-the-record presentence conference between sentencing judge and defendant's attorney.

Affirmed.

Coleman, C. J., and Ryan, J., concurred and filed statement.

Williams, J., concurred in part, dissented in part and filed opinion, in which Levin, J., joined.

[411 Mich. 526] David H. Sawyer, Kent County Pros. Atty., Carol S. Irons, Chief Appellate Atty., Grand Rapids, for plaintiff-appellee.

George S. Buth, Grand Rapids, for defendant-appellant.

PER CURIAM.

James Corzel Pulley was charged with one count of unlawful delivery of heroin and one count of conspiracy to deliver heroin. He pled guilty of attempted possession with intent to deliver heroin, ([FN1]) and was sentenced to serve six to ten years imprisonment.

Pulley appealed, raising one issue: whether his [411 Mich. 527] sentence should be vacated because he was not present at an in-chambers, off-the-record presentence conference between the sentencing judge and Pulley's attorney. The Court of Appeals affirmed in an unpublished opinion. ([FN2]) We granted leave to appeal.

*171 I

At the outset of the in-court sentencing proceeding, the circuit judge addressed defense counsel, saying:

> "Mr. Dodge, you have already discussed this matter with the court in chambers. Do you wish to respond any further to the presentence investigation report?"

It is thus apparent that the judge and defense counsel discussed the presentence report and, presumably, the sentence, in Pulley's absence. The balance of the sentencing record shows that the prosecutor was also given the

opportunity to respond to the presentence report, and that Pulley was accorded his opportunity for allocution.

Pulley asserts that his opportunity for allocution and to refute the contents of the presentence report was made ineffective by his absence from the presentence conference, and that the presentence conference is a critical stage of a criminal prosecution at which a defendant has a constitutional right to be present. The prosecutor maintains that Pulley had a full opportunity for allocution[411 Mich. 528] and to respond to the presentence investigation report, and that his right to be present extends only to his trial, which ends with the rendition of the verdict.

II

While the power to set the range of punishment for a given offense is legislative, ([FN3]) bringing that statutory range of discretion to bear upon an individual defendant in the form of a sentence has been confided to the judiciary. ([FN4]) The exertion of such judicial process has traditionally required that the accused be given the opportunity to personally participate. ([FN5])

> " 'A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.' " People v. Medcoff, 344 Mich. 108, 114, 73 N.W.2d 537 (1955), quoting Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892).

In 1882, this Court invalidated a statute prescribing the procedure applicable to persons convicted and imprisoned as disorderly by a justice of the peace. ([FN6]) The statute required the circuit court, at the beginning of each term, to inquire into the circumstances of each case, to hear any proofs

offered, and to order a prisoner released, bound out as an apprentice or servant or committed to jail at hard labor. The Court said:

> [411 Mich. 529] "Now surely it requires no argument at the present day, nor citation of authorities, to show that none of these things can be done by the circuit court unless the person convicted is personally present. It would be so clearly contrary to our fundamental law to permit evidence to be introduced and considered against a person convicted or accused; or to permit the sentence imposed to be increased, as this statute provides, in the absence of the person convicted, that we cannot think the Legislature contemplated such a thing. If attempted it would be clearly unconstitutional and of no force or effect." In the Matter of Fowler, 49 Mich. 234, 238, 13 N.W. 530 (1882).

[1] An analysis of the character of the sentencing proceeding reveals its kinship to the process of determining guilt or innocence at trial, and the consequent need for defendant's presence and participation. Michigan sentencing policy currently requires that

> "the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest *172 in maximizing the offender's rehabilitative potential." People v. McFarlin, 389 Mich. 557, 574, 208 N.W.2d 504 (1973).

To so tailor the sentence, the judge must gather complete and detailed information about the offender. ([FN7]) The judge must assess the reliability of the information received, ([FN8]) assure that it is reasonably up-to-date, ([FN9]) determine its competency as a [411 Mich. 530] sentencing

consideration, ([FN10]) and resolve challenges to its accuracy. ([FN11])

The lack of knowledge of what went on in conference denigrates the defendant's personal right of allocution. GCR 1963, 785.8(2). What Pulley has argued may often be true:

> "To provide the defendant with a chance to speak after extensive chamber discussions is worthless. If defendant has been excluded from this crucial sentencing discussion, he not only must challenge any preconceived determination, but must do so in the dark."

Closely related to assuring the actual fairness and reliability of the proceeding is assuring the appearance of fairness and reliability so essential to maintaining confidence in courts as instruments of justice. ([FN12]) Proceedings secret to the defendant, whether or not fair in fact, are antithetic to the defendant's perception that he is being treated fairly. As expressed in an English case in which a witness had been questioned by the court in the absence of the defendant:

> "That is a matter which cannot possibly be justified. I am not suggesting for one moment that the justices had any sinister or improper motive in acting as they did. It may be that they sent for this officer in the interests of the accused; it may be that the information which the officer gave was in the interests of the accused. That [411 Mich. 531] does not matter. Time and again this court has said that justice must not only be done but must manifestly be seen to be done." Rex v. Bodmin Justices ex parte McEwen, (1947) KB 321, 325; (1947) 1 All Eng.Rep. 109 (emphasis supplied).

One has only to imagine a defendant sitting in the courtroom while his attorney, probably appointed by the state,

and the judge are discussing his fate behind closed doors to see how easily the defendant's predictable dissatisfaction with the fairness of his sentence will become dissatisfaction with the fairness of the system.

Of comparable importance to the defendant's perception of fair treatment is society's perception that the process by which it deprives certain of its members of their liberty is fair, just and reliable:

> "Against the practical ease of administration associated with informality must be weighed the ceremonial value of solemn formality and procedural regularity as indices of society's commitment to the principle that liberty and life ought not to be taken away cheaply or carelessly. Although it may be burdensome to society and, in rare cases, even disadvantageous to the defendant to allow him and his counsel to participate actively in the sentencing proceeding, recognition of their right to do so, whatever other justifications it may have, signifies a way of *173 dealing with individuals which is fundamental to a free society." ([FN13])

III

[2][3] A majority of the Court, however, is of the opinion that this defendant was not prejudiced by his absence from the sentence conference. There has been no showing, on this record, that what transpired at the conference was objectionable in [411 Mich. 532] any fashion. Accordingly, while the foregoing statements in this opinion reveal some of our concerns regarding the issue of a defendant's right to be present at such a conference, we decline at this time to require, as a matter of policy, that an accused be present upon request at this conference.

In light of our concerns, however, we are considering the adoption of a rule governing this area. A proposed rule is set forth in the appendix to this opinion. The proposal will be published for comment prior to our further consideration of it.

We have also examined the defendant's claims that his absence from the sentence conference violated his constitutional rights. We find those contentions to have no merit.

The motion for leave to file a supplemental brief is denied.

The decision of the Court of Appeals is affirmed.

MOODY, FITZGERALD and KAVANAGH, JJ., concur.

COLEMAN, Chief Justice and RYAN, Justice, concurring.

We concur in the Court's conclusion that the defendant was not prejudiced by his absence from the sentence conference.

APPENDIX

In the Matter of the Proposed Amendment of GCR 1963, 785.8. Rule 785. Criminal Procedure

.1-.7 (Unchanged.)

.8 Sentencing

(1) Sentence Conferences. A defendant has the right to be present at any conference between the [411 Mich. 533] court and the defendant's lawyer regarding the sentence to be imposed. This right shall be afforded unless the defendant affirmatively waives the right either on the record or in

writing.

(2) Sentence Proceedings. Before sentence is imposed, the court shall

(a) give defendant and his lawyer a reasonable opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence; and

(b) state the minimum and maximum sentence imposed by the court, together with any credit for time served to which the defendant may be entitled.

(3) Absence of Defendant's Lawyer. Sentence may not be imposed in the absence of the defendant's lawyer unless the defendant affirmatively waives the lawyer's presence.

(4) Failure to Comply With Rule. The provisions of subrule 785.8 are mandatory and failure to comply shall require resentencing.

.9-.13 (Unchanged.)

WILLIAMS, Justice (concurring in part; dissenting in part).

With my colleagues' determination to consider a court rule to guarantee defendants' right to be personally present at every stage of the trial where their substantial rights may be affected, including in-chambers conferences with the judge, I am in full concurrence.

However, I respectfully differ with my colleagues' finding that the defendant in this case was not deprived of constitutional due process. I believe he was and would have reversed the decision of the Court of Appeals and remanded

for resentencing.

In People v. Medcoff, 344 Mich. 108, 73 N.W.2d 537 [411 Mich. 534] (1955), this Court found that defendant's absence during an examination by the trial court into possible misconduct *174. by jurors constituted reversible error. ([FN1]) The right of the defendant "to be present at all stages of the trial where his substantial rights might be affected" was found to be as fundamental as the right to trial by an impartial jury. ([FN2]) The Court recognized that under Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Due Process Clause provides defendants

> "the right to be personally present at every stage of the trial where their substantial rights may be affected by the proceedings and where their presence relates to the fullness of their opportunity to defend against the charge." ([FN3])

Although the examination of the jurors at issue in Medcoff occurred during the trial, the Court observed that

> "when considering what is the 'trial' for purposes of this question (defendant's right to be present) we can exclude formal and preliminary matters or matters occurring after the hearing on the merits or rendition of the verdict, as well as other matters." (Emphasis supplied.)

Relying on this dictum, ([FN4]) the prosecutor maintains [411 Mich. 535] that a defendant's right to be personally present ends with the trial, and thus that the right to be present depends on the chronological stage of the proceeding rather than on the substantive nature of the inquiry.

A right as fundamental as the right to be personally

present is not subject to such formalistic confinement.

A proper analysis of when a defendant has the right to be present should depend on the character of the proceeding and whether the reasons supporting a defendant's right to be present at trial are equally applicable to that proceeding. Of particular concern are whether substantial interests of the defendant may be affected, and whether the defendant's presence bears a reasonably substantial relation to his opportunity to affect the reliability or fairness of the judicial process being exerted upon him.

LEVIN, J., concurs.

(FN1.) M.C.L. s 335.341(1)(a); M.S.A. s 18.1070(41)(1)(a); M.C.L. s 750.92; M.S.A. s 28.287.

(FN2.) The Court of Appeals said:

> "The in-chambers off-the-record sentencing conference between the trial court and defense attorney did not violate defendant's rights. The record affirmatively shows that both defense counsel and defendant were given the opportunity to challenge the presentence report pursuant to GCR 1963, 785.12 and the right to allocution pursuant to GCR 785.8."

(FN3.) People v. Hall, 396 Mich. 650, 658, 242 N.W.2d 377 (1976); People v. Palm, 245 Mich. 396, 404, 223 N.W. 67 (1929).

(FN4.) People v. Cook, 147 Mich. 127, 133, 110 N.W. 514 (1907).

(FN5.) See, generally, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

(FN6.) In the Matter of Fowler, 49 Mich. 234, 13 N.W. 530 (1882).

(FN7.) People v. Triplett, 407 Mich. 510, 514, 287 N.W.2d 165 (1980).

(FN8.) United States v. Weston, 448 F.2d 626 (CA 9, 1971).

(FN9.) People v. Triplett, supra.

(FN10.) United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); People v. Provost, 403 Mich. 843, 271 N.W.2d 777 (1978); People v. Anderson, 391 Mich. 419, 216 N.W.2d 780 (1974); People v. Grimmett, 388 Mich. 590, 202 N.W.2d 278 (1972); People v. Earegood, 383 Mich. 82, 173 N.W.2d 205 (1970).

(FN11.) People v. Lee, 391 Mich. 618, 218 N.W.2d 655 (1974); People v. Malkowski, 385 Mich. 244, 188 N.W.2d 559 (1971); People v. McIntosh, 62 Mich.App. 422, 234 N.W.2d 157 (1975); People v. Zachery Davis, 41 Mich.App. 683, 200 N.W.2d 779 (1972). See Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948).

(FN12.) United States v. Gregorio, 497 F.2d 1253, 1258 (CA 4, 1974).

(FN13.) Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv.L.Rev. 821, 832 (1968).

***174_** (FN1.) One part of Medcoff 's holding, that prejudice is conclusively presumed to have resulted from defendant's absence, was rejected in People v. Morgan, 400 Mich. 527, 536, 255 N.W.2d 603 (1977), in favor of the standard of "any reasonable possibility of prejudice."

(FN2.) Medcoff, supra.

(FN3.) Medcoff, supra, 344 Mich. p. 115, 73 N.W.2d 537. See also Faretta v. California, 422 U.S. 806, 819 fn. 15, 95 S.Ct. 2525, 2533 fn. 15, 45 L.Ed.2d 562 (1975):

"It is now accepted * * * that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, Snyder v. Massachusetts * * *."

(FN4.) The prosecution also relies on People v. Ormsby, 48 Mich. 494, 12 N.W. 671 (1882), and People v. Boyd, 49 Mich.App. 388, 212 N.W.2d 333 (1973). Ormsby held that a defendant has no right to be present when the court hears a motion for new trial on the ground that the verdict was contrary to the evidence, analogizing that proceeding to review by an appellate court. The nature of the inquiry in Ormsby, i. e., an analysis of the legal sufficiency of evidence adduced at trial, is factually distinguishable from the present case where new evidence was received and evaluated to reach the initial determination of the proper sentence. Boyd involved a pretrial suppression hearing and, rather than supporting the prosecutor's position, apparently concluded that the defendant had the right to be present. Boyd's further conclusion that the right was waivable was conditioned upon a finding of no prejudice from the defendant's absence, a finding that cannot be made on this record.

227 N.W.2d 312, 58 Mich.App. 268, People v. Ranes, (Mich.App. 1975)

*312 227 N.W.2d 312

58 Mich.App. 268

Court of Appeals of Michigan, Division No. 3.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Danny Arthur RANES, Defendant-Appellant.
Docket No. 16949.
Feb. 10, 1975.
Released for Publication April 4, 1975.

Defendant was convicted in the Circuit Court, Kalamazoo County, Donald T. Anderson, J., of second-degree murder and first-degree murder in perpetration or attempted perpetration of rape and he appealed. The Court of Appeals, T. M. Burns, P.J., held that torn-up paper which was found by deputy in defendant's jail cell and which contained proposal to obtain witness who for payment would falsely testify that she had been with defendant on night of killing was admissible to rebut testimony of defendant's alibi witnesses; that trial court did not err in admitting photographs of deceased taken at scene; and that trial court did not abuse its discretion in limiting defendant's pretrial discovery.

Affirmed.

*313 Danny Arthur Ranes, in pro per.

[58 Mich.App. 269] Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., Donald A. Burge, Pros. Atty., for plaintiff-appellee.

[58 Mich.App. 270] Before T. M. BURNS, P.J., and R. B. BURNS and CARLAND, (FN*), JJ.

T. M. BURNS, Presiding Judge.

On March 2, 1973, defendant Danny Arthur Ranes was convicted by a jury of second-degree murder, M.C.L.A. s 750.317; M.S.A. s 28.549, and first-degree murder in the perpetration or attempted perpetration of rape, M.C.L.A. s 750.316; M.S.A. s 28.548. On March 26, 1973, defendant was sentenced to life imprisonment on count one and life imprisonment in solitary confinement at hard labor on count two, the sentences to run concurrently. Defendant now appeals his convictions as of right.

Since defendant's allegations of error relate to the trial court's evidentiary rulings and other procedural matters, a detailed recitation of the facts of this case is unnecessary, and thus only those facts pertinent to our discussion of the issues will be presented.

While defendant was absent from his jail cell taking a shower, the cell was searched by police. A deputy found some torn-up paper in the toilet. These pieces of paper, when put together, read as follows:

'Do you know any married woman who could use $500 for taking the stand and saying she was with me on the night of the Howk killing? One who would have a reason to remember that (whatever the reason was) night that will stand up in court and also remember that I had a bandaid on my left cheek and told her I scratched it while tearing down a garage. It has to be a Saturday night I was with her. She must be strong so the cops can't break her down no matter what they say or do. Also she will have to go to the newspaper office (Gazette) and look in the past issues for the date and all [58 Mich.App. 271]

the back pictures of me so she will know me when she sees me. Let me know as soon as you can as all visits and phone calls in new jail are to be taped. If you know of anyone at least get me her address so I can handle the mail through Contos. The money will come when my feet hit the streets.'

This note was not introduced in the prosecution's case in chief, but to rebut the testimony of defendant's alibi witnesses. Defendant now claims this note was improperly *314 admitted into evidence by the trial court. We disagree.

In People v. Moore, 51 Mich.App. 48, 52, 214 N.W.2d 548 (1974), a letter sent by the defendant to another prison inmate proposing shady trial assistance and reciprocation was intercepted by the prosecutor and offered in evidence. In holding the letter admissible, this Court stated:

> 'Defendant's credibility had been brought into the trial by other witnesses. The letter and its contents were material on this issue. We adhere to the rule that the materiality and relevancy of evidence is within the discretion of the trial judge and an appellate court will not interfere unless there is an abuse. People v. Sheehy, 31 Mich.App. 628, 188 N.W.2d 231 (1971); People v. Doane, 33 Mich.App. 579, 190 N.W.2d 259 (1971). On the question presented we find no reversible prejudice or abuse of judicial discretion.'

[1] Such is the case here. Here a note was intercepted before it reached any third party. Defendant's credibility had been brought into the trial by alibi witnesses and the note and its contents were material to the alibi issue. Under these circumstances, we do not feel that the trial court abused its discretion in admitting the note into evidence.

[2] Defendant also argues that the note was inadmissible

because it constituted evidence of an entirely[58 Mich.App. 272] separate crime, unrelated to his case, namely, the procurement of perjury.

[3] Recently, this Court in People v. Hooper, 50 Mich.App. 186, 199, 212 N.W.2d 786 (1973), lv. den. 391 Mich. 808 (1974), considered this same question, although testimonial evidence rather than a writing was challenged. We consider the Court's statement to be dispositive of this issue:

> 'The grounds on which this evidence is admissible has been commonly termed as being 'consciousness of a weak case.' In 2 Wigmore, Evidence (3d ed), s 278, p. 120, the rule is stated as follows:
>
> "It has always been understood--the inference, indeed, is one of the simplest in human experience--that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.'
>
> 'Michigan has long followed this rule and held that evidence that a defendant has attempted to suppress testimony or induce perjury is admissible. People v. Salsbury, 134 Mich. 537, 96 N.W. 936 (1903); People v. Adams, 162 Mich. 371, 127 N.W. 354 (1910); People v. Randall, 294 Mich. 478, 293 N.W. 725 (1940). This Court recently reaffirmed this longstanding rule in People v. Casper, 25 Mich.App. 1, 7, 180 N.W.2d 906, 909 (1970), wherein the rule was stated as follows:
>
> "Michigan authority appears uniform in holding that

> actions by the defendant such as flight to avoid lawful arrest, procuring perjured testimony and attempts to destroy evidence, while possibly as consistent with innocence as with guilt, may be considered by the jury as evidence of guilt.'
>
> 'Thus, in the instant case there was no error in allowing this testimony since it was proper evidence for the jury to consider.'

[58 Mich.App. 273] [4] Defendant's next assertion of error is that the trial court erred in admitting into evidence photographs of the deceased, taken at the scene. Since probative value outweighed prejudice, no abuse of discretion occurred. Defendant contends that since the defense was alibi, the photographs were unnecessary and merely calculated to inflame the jury, citing People v. Falkner, *315. 389 Mich. 682, 209 N.W.2d 193 (1973). The prosecutor argues that the photographs were material to prove premeditation and deliberation, a condition notably absent in Falkner. Furthermore, the prosecutor points out that while the defense in this case is alibi, the underlying circumstances are different from those present in Falkner. Here much of the evidence against defendant consisted of what he told a witness about the crime. Due to the nature of this witness's testimony and the fact that he was not present when the crime was committed, the pictures were material and necessary to illustrate both his testimony, especially that concerning his conversations with defendant about the use of knives, ropes and gags in the killing, and the fact that the photographs depicted his method in the death of this victim.

Therefore, we conclude that these photographs were 'substantially necessary or instructive to show material facts or conditions' and not merely 'calculated to excite passion and prejudice'. People v. Falkner, Supra, 685, 209 N.W.2d 194,

People v. Eddington, 387 Mich. 551, 198 N.W.2d 297 (1972).

Defendant next maintains that the trial court erred in denying his motion for the production of documents and evidence. In denying the motion, the trial court stated:

> 'The court denies to the defendant the right to copies of all statements, reports, notes or tapes made or given [58 Mich.App. 274] by witnesses except that if any statement, report, note or tape made or given by witnesses is used to refresh the recollection of the witness at the trial, then a copy shall be made available to the defense.'

[5] GCR 1963, 785.1(2) expressly excludes the application of discovery rules in criminal cases. Furthermore, the scope of discovery of a criminal case rests within the sound discretion of the trial court. People v. Brocato, 17 Mich.App. 277, 285, 169 N.W.2d 483 (1969); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); People v. Maranian, 359 Mich. 361, 102 N.W.2d 568 (1960).

[6] In the instant case, defendant failed to convince the trial court that the requested discovery was necessary prior to trial. Also, the trial court's order did not completely eliminate discovery. The court did provide for the production of these requested materials if needed to refresh the recollection of a witness during trial and in addition defendant was afforded an opportunity for full cross-examination of witnesses at trial. Under these circumstances, we find that the trial court did not abuse its discretion in limiting defendant's pretrial discovery.

[7][8] Defendant next predicates error on the fact that the trial court denied his motion for change of venue prior to trial. We disagree. While either party may be granted a change of venue 'upon good cause shown', M.C.L.A. s 762.7; M.S.A. s 28.850, the denial of such motions rests in the trial court's

discretion. To set aside such a decision, a clear showing of abuse on the part of the trial court must be demonstrated. People v. Kochan, 55 Mich.App. 326, 222 N.W.2d 317 (1974); People v. Shugar, 29 Mich.App. 139, 185 N.W.2d 178 (1970). We find no abuse of discretion in the case at bar.

Finally, we have closely examined the record in [58 Mich.App. 275] the case at bar and considered the defendant's remaining assignments of error. No error warranting or requiring reversal of defendant's convictions has been disclosed.

Affirmed.

(FN*) MICHAEL CARLAND, former Circuit Court Judge, sitting on the Court of Appeals by assignment pursuant to Const.1963, art. 6, s 23 as amended in 1968.

234 N.W.2d 673, 63 Mich.App. 498, People v. Ranes, (Mich.App. 1975)

*673 234 N.W.2d 673

63 Mich.App. 498

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Danny RANES, Defendant-Appellant.
Docket No. 18210.
Aug. 25, 1975.
Released for Publication Nov. 10, 1975.

Defendant was convicted before the Kalamazoo County Circuit Court, Lucien F. Sweet, J., of first-degree murder, and he appealed as of right. The Court of Appeals, D. E. Holbrook, Jr., J., held that testimony of county jail inmate that defendant asked inmate if he knew of anyone that could take a contract on defendant's accomplice and testimony of another witness that defendant attempted to get him to take the stand and lie about defendant's involvement was admissible, that prosecution witness' reference to having taken polygraph test was not reversible error where such reference was unsolicited and court immediately instructed jury to disregard, that refusal to give requested lesser included offense instructions was not error and that photographs were relevant and admissible as confirming testimony of prosecution witness as to method, fact, time, and place of murder.

Affirmed.

*675 [63 Mich.App. 499] Thomas M. Powers, Kalamazoo, for defendant-appellant.

Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., Donald A. Burge, Pros. Atty., for plaintiff-appellee.

Before V. J. BRENNAN, P.J. and J. H. GILLIS and D. E. HOLBROOK, Jr., JJ.

D. E. HOLBROOK, Jr., Judge.

Defendant was convicted by a jury of first degree murder. M.C.L.A. s 750.316; M.S.A. s 28.548. Thereafter, defendant was sentenced [63 Mich.App. 500] to life imprisonment in solitary confinement at hard labor. He now appeals as of right.

Crucial to defendant's conviction was the testimony of witnesses Brent Koster, who testified that he and defendant acting together raped and murdered the deceased, Pamela Fearnow; Lee Keaton, a county jail inmate who testified that defendant, while also in jail, asked Keaton if he knew of anyone that could take a contract to kill Koster because he, the defendant, would have a lot better chance of beating the rap if Koster was out of the way; and one Richard Fee, who testified that defendant attempted to get him to appear as a witness for the defense and further attempted to convince Fee to say that Koster had been lying about defendant's involvement because of a deal made with the prosecution.

[1] Initially, defendant contends that the testimonies of Keaton and Fee relating to evidence which occurred subsequent to the crime were improperly admitted into evidence, resulting in reversible error. We disagree. This issue is controlled by People v. Hooper, 50 Mich.App. 186, 199, 212 N.W.2d 786, 792 (1973), Lv. den., 391 Mich. 808 (1974). The following quote from People v. Hooper, supra, illustrates the rule:

'Michigan has long followed this rule and held that

evidence that a defendant has attempted to suppress testimony or induce perjury is admissible. People v. Salsbury, 134 Mich. 537, 96 N.W. 936 (1903), People v. Adams, 162 Mich. 371, 127 N.W. 354 (1910), People v. Randall, 294 Mich. 478, 293 N.W. 725 (1940). This Court recently reaffirmed this long-standing rule in People v. Casper, 25 Mich.App. 1, 7, 180 N.W.2d 906, 909 (1970), wherein the rule was stated as follows:

"Michigan authority appears uniform in holding that actions by the defendant such as flight to avoid lawful arrest, procuring perjured testimony and attempts[63 Mich.App. 501] to destroy evidence, while possibly as consistent with innocence as with guilt, may be considered by the jury as evidence of guilt.'

'Thus, in the instant case there was no error in allowing this testimony since it was proper evidence for the jury to consider.'

Defendant by attempting to procure a contract on Koster attempted to suppress his testimony. Further, by attempting to get Fee, a witness to lie defendant was attempting to induce perjury. Under People v. Hooper, supra, the testimony of both Keaton and Fee was proper evidence for the jury's consideration.

[2][3][4] Next defendant contends that the following colloquy between the prosecutor and the witness Fee constitutes reversible error:

'Q: Have you lied to keep from getting into trouble in the past?

'A: Yes.

'Q: Are you telling the truth now, Rich?

'A: Yes.

'Q: How do we know that?

'A: I took a lie detector test--'

*676 Immediately following the foregoing colloquy the court stated:

> 'Members of the jury, what the witness just said about having taken a lie detector test, you should disregard entirely.'

The court further proceeded to explain the unreliability of lie-detector tests and again cautioned the jury to put it out of their minds because it had no evidentiary value. Defendant moved for a mistrial which motion was denied and now claims [63 Mich.App. 502] that the court committed reversible error in denying said motion.

It is a long-standing rule in Michigan jurisprudence that the results of polygraph tests are not admissible in evidence. People v. Frechette, 380 Mich. 64, 155 N.W.2d 830 (1968). This includes polygraph tests given both the defendant and any witnesses. People v. Goodwin, 40 Mich.App. 709, 199 N.W.2d 552 (1972).

We are of the opinion however that reversible error does not exist where the polygraph reference is unsolicited, no mention is made of its results, and where the court gives a complete cautioning instruction. In People v. Davis, 53 Mich.App. 94, 96, 218 N.W.2d 787, 789, Cert. den., 419 U.S. 1080, 95 S.Ct. 670, 42 L.Ed.2d 674 (1974), the Court held:

> 'We find no merit in defendant's argument that reversible error was committed at trial when reference was made to

defendant's taking a polygraph examination and when the trial court denied defendant's subsequent motion for a mistrial. The reference to the polygraph examination was made by defendant as a nonresponsive answer to a question posed by the prosecutor. The trial court immediately after defendant's answer was given, instructed the jury to disregard any mention of the polygraph and in its final instructions specifically instructed the jury to disregard 'any and all references made to the term 'polygraph' or 'polygraph administration ". No grounds for mistrial were present, and we find no reversible error. People v. Tyrer, 19 Mich.App. 48, 51, 172 N.W.2d 53 (1969), Appeal dismissed, 385 Mich. 484, 189 N.W.2d 226 (1971), People v. Paffhousen, 20 Mich.App. 346, 351, 174 N.W.2d 69 (1969), Leave to appeal denied, 383 Mich. 825 (1970).'

In the instant case the court immediately ordered the testimony stricken and gave complete cautionary instructions. In addition the court explained[63 Mich.App. 503] to the jury the unreliability of lie-detector tests. The reference here to the witness having taken a lie-detector test was isolated and never mentioned again throughout the course of the trial. The reference by Fee to having taken the test was brief and we cannot say it was intentional, advertent or solicited. Nor can we say that the prosecutor was seeking the answer he received. Occasionally an unsophisticated witness may, inadvertently, make reference to improper information in the hearing of the jury. Under the circumstances here, however, and especially in view of the fact that the polygraph reference was unsolicited, no mention was made of its results, the court immediately instructed the jury to disregard the testimony, proceeded to explain the unreliability of such tests, and cautioned the jury to remove it from their minds because it had no evidentiary value, no error existed. Defendant's motion for mistrial was properly denied.

[5][6][7][8] Defendant also contends that the trial court committed reversible error in denying two pre-trial motions for change of venue. We do not agree. While either party may be granted a change of venue 'upon good cause shown', M.C.L.A. s 762.7; M.S.A. s 28.850, the denial of such motion rests in the trial court's discretion. To set aside such a decision, a clear showing of abuse on the part of the trial court must be demonstrated. People v. Kochan, 55 Mich.App. 326, 222 N.W.2d 317 (1974), People v. Shugar, 29 Mich.App. 139, 185 N.W.2d 178 (1970), People v. Ranes, 58 Mich.App. 268, 227 N.W.2d 312 (1975).

***677** A showing that some jurors may have read or heard of the case through the news media is not sufficient. The party seeking the change must show juror influence and the burden of showing [63 Mich.App. 504] such influence is on the challenger. People v. Moore, 51 Mich.App. 48, 52, 214 N.W.2d 548 (1974). The record on appeal does not indicate that the jurors selected would be unable to render an impartial verdict. People v. Stockard, 48 Mich.App. 680, 211 N.W.2d 62, Aff'd 391 Mich. 481, 219 N.W.2d 68 (1974). Defendant has therefore failed to meet his burden of showing undue influence or pre-conceived opinion in this case. Hence, no abuse of discretion exists.

Further, following commencement of trial, the following colloquy occurred between the court and defense counsel:

'The Court: Am I correct, Mr. Contos, that you have exhausted your peremptories.

'Mr. Contos: I have, your Honor.

'The Court: Alright swear the jury. Let me say for the record that I am satisfied that none of the jurors now in the box entertain such a present opinion as to influence

> the verdict of any such jurors, and you may swear the jurors in the box.'

There was no comment or objection to the trial judge's observations and ruling. Counsel's conduct created an inference of satisfaction with the jury which militates against his argument of jury bias. People v. Stockard, supra, People v. Collins, 43 Mich.App. 259, 263, 204 N.W.2d 290 (1972), Lv. den., 391 Mich. 798 (1974), People v. Greene, 42 Mich.App. 154, 155, 201 N.W.2d 664 (1972), Lv. den., 388 Mich. 783 (1972), People v. Harrell, 54 Mich.App. 554, 221 N.W.2d 411 (1974). We therefore conclude that the trial court did not err in denying defendant's motions for change of venue.

[9] Defendant further contends the trial court erred in refusing to give the following instruction regarding alternative verdicts:

> [63 Mich.App. 505] 'Lesser included offenses are second-degree murder, manslaughter, assault with intent to commit murder, assault with intent to do great bodily harm less than the crime of murder, felonious assault, assault with intent to commit any felony not otherwise punished, assault and infliction of serious injury, assault and battery, and simple assault.'

Defense counsel objected to the court's failure to give the requested instruction. Instead, the trial court gave the jury the choice of four verdicts: first-degree murder, second-degree murder, manslaughter and not guilty. The court's instruction as to alternative verdicts reads as follows:

> 'Consequently, if you find beyond all reasonable doubt that Danny Ranes was concerned in the commission of the killing of Pamela Fearnow at the place and at the time charged, or that he aided or abetted another, to-wit: Brent

Koster, in killing of Pamela Fearnow, by word or deed, either by words of encouragement, sustenance, or support, or by actions giving encouragement, sustenance, or support, he would be equally responsibile for such killing with the person who actually did the act that caused the death of Pamela Fearnow, and you should then determine whether murder is in the first degree, murder in the second degree, or manslaughter was committed by the defendant.'

The evidence upon which defendant claims he was entitled to his requested instruction appears in the following testimony of Richard Fee while being examined by the prosecuting attorney:

'Q: Did the defendant tell you anything about the crime itself?
'A: Yes, he did.

'Q: Do you know why he told you about that?

'A: I believe he was trying to convince me he didn't have anything to do with it.

[63 Mich.App. 506] 'Q: So that you would lie for him?

'A: Yes.

*678 'Q: What did he tell you?

'A: He told me that he picked the Fearnow girl up hitchhiking.

'Q: He admitted he had picked her up hitchhiking?
'A: Yes, and she wanted to go to the West Main Mall. He then told me he drove to the West Main Mall, and Brent

and the girl wanted to go to the lake, so Danny drove them out to the lake, and when he got to the lake Brent asked Danny if he would go down to the store and get some beer, so Danny went down to the store. When he got back with the wine he asked Brent where the girl was, and he said Brent told him he had killed her.'

Here the jury was given the option of finding first-degree murder, second-degree murder, or manslaughter if they found defendant aided or abetted in the killing, and not guilty if he did not. The jury verdict reflects they believe Koster did not kill the girl on his own, without aid or assistance from the defendant, and that defendant participated. Hence, we conclude the trial court's instructions were sufficient and error, if any, resulting from the court's refusal to give defendant's requested instruction would, under the circumstances, be harmless beyond a reasonable doubt; for if the jury believed that the offense occurred during defendant's absence they would be obliged to return a verdict of not guilty. Error therefore, if any, inured to the benefit of the defendant who cannot now complain on appeal.

[10][11][12][13][14] Lastly, defendant contends that the trial court committed error in denying defendant's motion for a mistrial where a police officer characterized a photograph of the deceased, as that of a partially eaten skeleton and further that the court erred by admitting into evidence certain photographs of the [63 Mich.App. 507] area in which the deceased was found together with other photographs depicting decedent's body which photographs were taken in said area.

The testimony to which the defendant objected was that of Sheriff Robert Van Streain:

'Q: Did the body appear to be intact?

'A: Yes, sir, with the exception of a foot.

'Q: Where was that?

'A: Apparently the animals had gotten to it.'

Defendant moved for a mistrial on the grounds that this testimony had no probative value, was inflammatory and denied defendant a fair trial. The court offered to give a cautionary instruction to which defense counsel agreed while at the same time observing that it did not erase the prejudice. In this regard the court instruction the jury as follows:

> 'Members of the jury, Sergeant Van Streain, when he was describing the body that was found, as he testified to, gave his conclusion that a foot was missing, that the ants had gotten to it. That statement by him was a conclusion. It is stricken, and you should disregard it.'

We conclude that the above statements of the witness Van Streain were not prejudicial and that the court's instruction eliminated and removed any possible inference of prejudice.

With respect to the admission of the photographs into evidence this is a matter which is in the sound discretion of the trial court. In exercising that discretion a trial judge must weigh the probative value of such photographic evidence against the potential prejudicial effect. People v. Musser, 53 Mich.App. 683, 691, 692, 219 N.W.2d 781 [63 Mich.App. 508] (1974), Lv. den., 392 Mich. 798 (1974), People v. Eddington, 387 Mich. 551, 198 N.W.2d 297 (1972).

This Court has the right to make its own evaluation of whether the pictures are excessively gruesome or inflammatory as balanced against materiality and prejudice. People v. Falkner, 389 Mich. 682, 209 N.W.2d 193 (1973),

People v. Banks, 50 Mich.App. 622, 628, 213 N.W.2d 817 (1973). *679. We conclude that the pictures were relevant, material and had probative value outweighing any possible prejudicial effect since they illustrated and confirmed the testimony of the people's witness Brent Koster, as to the method, fact, time and place of the murder. Koster's testimony was crucial to defendant's conviction. His credibility was an issue and the photographs when considered in conjunction with his testimony confirmed his credibility.

We find no error.

Affirmed.